2003

Byron Child Christiansen and Merrilee Christiansen, husband and wife v. Farmers Insurance Exchange : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

BYRON CHILD CHRISTIANSEN and MERRILEE CHRISTIANSEN, husband and wife, Plaintiffs/Respondents, vs. FARMERS INSURANCE EXCHANGE, Defendant/Appellant.	Appellate Court No. 20030836-SC District Court No. 030908140

BRIEF OF DEFENDANT/APPELLANT FARMERS INSURANCE EXCHANGE ON THE INTERLOCUTORY APPEAL FROM THE THIRD DISTRICT COURT, HONORABLE JOSEPH C. FRATTO, JR.

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PARTIES TO THE PROCEEDINGS

The names of all parties to the proceedings in the lower court are set forth in the caption of the case on appeal.

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JURISDICTION

Jurisdiction of this matter is properly before this Court pursuant to Article VIII, Section 3 of the Constitution of Utah and Utah Code Annotated §78-2-2.

ISSUES PRESENTED FOR REVIEW

The question presented on appeal is whether the lower court was correct in granting Defendant's request to stay the breach of contract action, but denying Defendant's request to stay the bad faith action and then ordering that it respond to discovery that may be relevant in the bad faith action. This question involves the determination of the following issues:

1. Is a showing of "legal entitlement" a prerequisite to maintaining a claim for underinsured motorist (UIM) benefits?
2. Should Plaintiffs' claim for bad faith be stayed pending Plaintiffs showing breach of contract?
3. Should proceedings in an action for bad faith be stayed pending a showing by Plaintiffs of "legal entitlement" to UIM benefits and breach of contract, thereby preventing discovery of matters relating only to the bad faith action?
4. Does a showing of "legal entitlement" to UIM benefits establish that the insurance company has breached its insurance contract or the implied covenant of good faith and fair dealing with Plaintiffs?

The lower court's legal conclusions staying the breach of contract claim, allowing the bad faith claim to proceed without first showing "legal entitlement" to UIM benefits and then

ordering discovery on the bad faith claim is reviewed for correctness. *Lieber v. ITT Hartford Ins. Ctr., Inc.*, 15 P.3d 1030 (Ut. 2000); *Miller v. USAA Casualty Ins.*, 44 P.3d 663, 670 (Ut. 2002).

PRESERVATION OF ISSUES IN TRIAL COURT

The issues presented on appeal were preserved by Defendant's Motion to Compel Arbitration and Request to Stay Breach of Contract, Bad Faith and Associated Causes; Defendant's Opposition to Plaintiffs' Motion to Compel and Request for a Protective Order Pursuant to Rule 26(c) (R. 117-127); and Defendant's Motion for Reconsideration (R. 177-178, 180-199).

STATEMENT OF THE CASE

This action arises out of Plaintiffs' claim for underinsured motorist benefits because of an automobile accident which occurred on May 10, 2001, resulting in alleged injuries to Plaintiffs. After receiving the policy limits from the tortfeasor's insurance carrier, Plaintiffs made a demand for the policy limits under the underinsured motorist provision of their insurance policy with Farmers Insurance Exchange ("Farmers"). While Farmers was investigating the claim, Plaintiffs filed suit alleging breach of contract, breach of the covenant of good faith and fair dealing (bad faith), and breach of fiduciary duty based on Farmers' failure to "diligently" investigate, evaluate, negotiate and reject or settle Plaintiffs' claim. (Plaintiffs' claim for breach of fiduciary duty was dismissed pursuant to Stipulation and Order on July 15, 2003).

Because of a dispute as to the value of the claim, Farmers elected arbitration pursuant to the arbitration provision in its policy and U.C.A. §78-31a-4 and §31A-21-13. Plaintiffs initially objected to arbitration so Farmers filed a Motion to Compel Arbitration of Plaintiffs' underinsured motorist (UIM) claim only and requested that the breach of contract, bad faith and associated causes of action be stayed. Defendant argued that the arbitration provision in its policy was valid and enforceable and that the arbitration of the Plaintiffs' UIM claim would establish whether Plaintiffs were "legally entitled" to benefits under the policy, a prerequisite to establishing whether there was a breach of the insurance contract, a prerequisite to filing a bad faith claim. Defendant requested that the lower court stay the breach of contract and bad faith claims pending a resolution of Plaintiffs' claim for UIM benefits in an arbitration proceeding.

Plaintiffs conceded that their UIM claim should be resolved in arbitration, but argued that they were not required to arbitrate their breach of contract or bad faith claim and requested the court sever the breach of contract and bad faith claim from the UIM claim which "probably should be arbitrated in accordance with Defendant's motion and the policy's arbitration provision." (R. 104). Subsequently, Plaintiffs agreed to arbitrate the matter but, simultaneously with the arbitration, wanted to proceed forward with the breach of contract and bad faith action.

Plaintiffs also filed a motion to compel responses to requests for admissions and requests for production of documents pertaining to the bad faith claim. In response, Defendant sought a

protective order requesting that it be protected from responding to discovery associated with the bad faith claim until Plaintiffs had established that they were "legally entitled" to UIM benefits under the policy. Farmers maintained that the discovery sought by Plaintiffs in connection with their bad faith claim would prejudice Defendant's position against Plaintiffs in the arbitration proceeding to determine whether Plaintiffs were entitled to UIM benefits.

Following a hearing on Plaintiffs' Rule 37 Motion for an Order Compelling Discovery, Defendant's Motion to Compel Arbitration and Request to Stay Breach of Contract, Bad Faith and Associated Causes, and Defendant's Motion for Protective Order Pursuant to Rule 26(c), the court ordered that Plaintiffs' breach of contract action be stayed pending arbitration of Plaintiffs' claim for UIM benefits, but denied Defendant's request to stay the bad faith claim. In addition, Plaintiffs' motion to compel Defendant's responses to requests for admissions and requests for production of documents was granted as to the requests for admissions (but since a copy of the requests for production of documents had not been provided to the court, the court made no ruling on the motion to compel with regard to those, nor on Defendant's motion for protective order regarding the same).

Defendant subsequently filed a motion for reconsideration, arguing that before Plaintiffs could recover for either breach of contract or bad faith, they must first establish that they were "legally entitled" to UIM benefits and, therefore, all proceedings should be stayed pending a resolution of the "legal entitlement" issue. Defendant further argued that discovery in connection

with Plaintiffs' bad faith claim was inappropriate and prejudicial to Defendant until Plaintiffs had shown that they were "legally entitled" to the contract benefits. Plaintiffs opposed Defendant's motion for reconsideration, arguing that establishing "legal entitlement" to UIM benefits was not a prerequisite to filing a claim for bad faith and that such a claim could be based on the refusal to bargain or settle, standing alone. The court denied Defendant's motion for reconsideration and, now having seen the requests for production of documents, granted Plaintiffs' motion to compel Defendant's responses to the requests and denied Defendant's motion for a protective order (with the exception of Request No. 10, which was subject to the protective order) (R. 175). In addition, the court denied Defendant's request to stay its order pending a decision on the Petition for Permission to Appeal Interlocutory Order, which had been filed. Defendant then filed a Motion for Expedited Stay in this Court, which was granted on November 25, 2003 pending a decision on the petition for interlocutory appeal.

In the meantime, Scott Daniels, the arbitrator on Plaintiffs' UIM claim, issued his decision on December 8, 2003 finding: that Plaintiff Byron Christiansen was scheduled to undergo cervical surgery during the week following the arbitration; that the settlement from the tortfeasor's liability carrier was reasonable until it was determined that Mr. Christiansen needed surgery; that Mr. Christiansen had not proven his claim for loss of past or future income as a result of the underlying motor vehicle accident, and; that Mr. Christensen had not proven his claim for past or future wage loss. Mr. Daniels also determined that Mr. Christiansen had a pre-

existing condition and, because of this, apportioned the need for the surgery 50% to the accident and 50% to pre-existing. Mr. Daniels then awarded general and special damages, based on this apportionment and assuming that Mr. Christensen was going to have surgery, in the amount of $74,867.50, which amounted to 50% of the costs that were attributable to the motor vehicle accident. In doing so, the arbitrator also decided to retain jurisdiction to modify the award if Mr. Christiansen did not proceed with his scheduled surgery (Exhibit 1 to Motion to Set Aside Permission for Interlocutory Appeal Due to Change in Circumstances filed by Plaintiffs with this Court) (Addendum). On December 10, 2003, Defendant's petition for interlocutory appeal was granted.

Plaintiffs then filed a motion to set aside the interlocutory appeal arguing that "if there was any need to demonstrate 'legal entitlement' to UIM benefits before proceeding on the bad faith claim", the arbitration award satisfied that. This Court, however, ordered that the issues raised in the interlocutory appeal proceed.

STATEMENT OF FACTS

On May 10, 2001, Plaintiff Byron Christiansen was involved in a motor vehicle accident with Umar Raja. As a result of this accident, Mr.Christiansen claimed personal injuries and Mrs. Christiansen claimed additional household services and compensation for past and future personal care of Mr. Christiansen (Plaintiffs' Complaint, R. 1-8). Mr. Christiansen subsequently settled with Mr. Raja's automobile liability carrier for $50,000, the policy limits (Plaintiffs' Complaint, R. 1-8). Plaintiff Byron Christiansen then filed a claim for UIM benefits with

Farmers, his own insurance carrier, specifically seeking the UIM limits under his policy (Plaintiffs' Complaint, R. 4; R. 73-74).

On August 19, 2002, Plaintiffs then made a demand for the UIM policy limits (R. 44-94). On October 24, 2002, Farmers retained Mike Hansen to evaluate and/or arbitrate Plaintiffs' request for the UIM benefits. In furtherance of this, Mr. Hansen requested various documents from Plaintiffs and also that Plaintiff Byron Christiansen submit to a sworn statement. That sworn statement was set for November 1, 2002 at 11:00 a.m. (R. 76). Plaintiff failed to timely provide the information requested by Mr. Hansen. For example, the income tax returns were provided on the morning of the scheduled sworn statement (R. 76, 80). Plaintiffs' counsel sent additional information concerning his clients' UIM claim to counsel for Farmers on November 12, 2002, November 25, 2002 and by fax on March 11, 2003 (R. 82, 85, 92-93). Information sent on March 11, 2003 was a list of 15 medical providers seen by Plaintiff Byron Christiansen (R. 93).

On April 11, 2003, Plaintiffs filed suit in Third District Court alleging breach of contract, breach of the implied covenant of good faith and fair dealing and breach of fiduciary duty (R. 1-8). In response, Ms. Maw was retained to defend Farmers. After filing an answer, Defendant then filed a Motion to Compel Arbitration and Request to Stay Breach of Contract, Bad Faith and Associated Causes (R. 31-32). Defendant also filed a Motion for Protective Order in response to Plaintiffs' Motion to Compel (R. 42-43, 128-129). As previously set forth in the "Statement of

the Case", the court ordered that Plaintiffs' UIM claim be resolved in arbitration, even though the parties had already stipulated to this, and granted Defendant's request to stay the breach of contract action, but denied Defendant's request to stay the bad faith action and ordered discovery that would be pertinent, if at all, only to the bad faith action to proceed. (R. 172-176, 231, 233-235).

On December 4, 2003, Plaintiffs' UIM claim was arbitrated by Scott Daniels. The arbitrator issued his ruling on December 8, 2003, finding that Mr. Christiansen was set to have cervical surgery the week following the arbitration, which would cost $49,735 in addition to medical costs previously incurred as a result of the accident of May 10, 2001. He also found that Mr. Christensen aggravated a pre-existing, non-symptomatic degenerative cervical condition, but that by July 18, 2001, he had improved considerably. Mr. Daniels also determined that Mr. Christiansen had a relapse at the end of July and into August of 2001, possibly due to several mechanisms unrelated to this motor vehicle suggested by the arbitrator and, in any event, Mr. Christiansen's problems at the time of the December 4, 2003 arbitration were a combination of a pre-existing condition, the automobile accident (noted as being very minor), and whatever triggered the July, 2001 setback. Further, that the settlement from the (tortfeasor's) liability carrier was reasonable prior to learning that he was to have surgery the week after the arbitration and that the accident was 50% responsible for the need for this surgery and, therefore, the Christiansens were entitled to the sum of $74,867.50, representing one-half of the cost of surgery and one-half of the total general damages awarded associated with the surgery (included in the

general damages was an amount for Merrilee Christiansen's loss as a result of having to work more in the business). Mr. Daniels determined that the Christiansens were not entitled to interest on the medical specials in that they had not yet been incurred. Finally, the arbitrator indicated that he would retain jurisdiction to modify the award if the petitioner did not have the scheduled surgery (Exhibit 1 to Plaintiff's Motion to Set Aside Permission for Interlocutory Appeal Due to Change in Circumstances) (Addendum). The arbitrator's award was paid by Farmers to Byron Christiansen on December 15, 2003.

SUMMARY OF ARGUMENTS

Plaintiffs' claim for UIM benefits is determined by their insurance policy. That policy provides UIM benefits as follows:

> We will pay all sums which an insured person is legally entitled to recover as damages from the owner or operator of an underinsured motor vehicle because of bodily injury sustained by the insured driver while occupying your insured car.

(Second Edition, E-Z Reader Car Policy, Utah p. 8.) (R. 123) (Emphasis added)

This provision is consistent with Utah's underinsured motorist statute, U.C.A. §31A-22-305(9)(a), which provides for underinsured motorist coverage "for covered persons who are legally entitled to recover damages from owners or operators of underinsured motor vehicles because of bodily injury, sickness, disease, or death." (Emphasis added)

Utah case law interpreting the "legally entitled" to language established that this can be shown by either obtaining a judgment or with a formal or informal settlement among the parties.

In this case, the parties could not reach an agreement on Plaintiffs' "legal entitlement" to recover UIM benefits, and opted to resolve this pursuant to the arbitration provision in the policy.

Plaintiffs have ignored the legal significance of this "legally entitled" to language and instead rely on *Beck v. Farmers Ins. Exchange*, 701 P.2d 795 (Ut. 1985) for the proposition that a refusal to bargain or settle, standing along, may be sufficient to prove bad faith, in essence creating an independent tort. However, in *Beck*, the Plaintiff was already determined to be "legally entitled" to the uninsured motorist benefits. For this reason, and others, the *Beck* language does not negate that Plaintiffs are required to first establish that they are "legally entitled" to UIM benefits, before pursuing a bad faith claim against their insurance company. This position was confirmed by the Utah Supreme Court in *Chatterton v. Walker*, 938 P.2d 255 (Ut. 1997), wherein the Court made it clear that "legal entitlement" to the policy benefits must be shown before a bad faith claim can be brought against the insurance company.

Here, where Plaintiffs simultaneously filed their claim for benefits under their insurance contract and their breach of contract and bad faith claim against the insurance company, the bad faith claim should have been stayed pending a showing not only of "legal entitlement" to UIM benefits, but breach of contract as well. This then requires that Plaintiffs first establish that they are "legally entitled" to benefits, which the parties and trial court agreed would be determined by arbitration.

The trial court, however, while staying the breach of contract action, incorrectly refused to stay the proceedings on Plaintiffs' bad faith action. Having wrongfully allowed the bad faith action to go forward, the trial court also denied Defendant's request for a protective order and allowed Plaintiffs to pursue discovery purportedly sought in connection with their bad faith claim, but which would prejudice the arbitration of the claim for UIM benefits. This prejudice was demonstrated by the very materials sought by Plaintiffs in this case. For example, Plaintiffs sought the claims file, which contained the thoughts and impressions of the claims handlers, as well as information regarding settlement value and any possible reserves set. Defendant was placed in the position of having to comply with the court's order that it produce responses to the discovery which could then be used by Plaintiffs to establish "legal entitlement" to the UIM benefits. This information would not be discoverable in connection with the UIM claim. Discovery, therefore, should not have been permitted until Plaintiffs first established that they were "legally entitled" to receive the UIM benefits under the policy.

The petition for interlocutory appeal was granted before "legal entitlement" was shown. However, showing of "legal entitlement" is not synonymous with a finding of breach of contract or breach of the implied covenant of good faith and fair dealing. Rather, it further demonstrates the need for the Court to outline the required analysis necessary in adjudicating a bad faith claim after a finding of "legal entitlement" to the benefits under the policy. The policy provided a procedure for resolution of questions of "legal entitlement" to UIM benefits, through arbitration.

The claim was arbitrated, an award was made, and it was promptly paid by the insurance company. The arbitrator's decision was not without reservation, for example the arbitrator had questions regarding the cause of Byron Christiansen's relapse several months after the accident in question. In addition, the arbitrator found that the settlement from the liability carrier was "a reasonable amount to settle the case prior to the determination to have surgery", suggesting that Plaintiff Byron Christiansen was not "legally entitled" to recover UIM benefits until the determination to have surgery was made shortly before the arbitration. Thus, from the time the matter was being evaluated, up until almost the date of arbitration, there could be no breach of contract and therefore no breach of the implied covenant of good faith and fair dealing. The arbitrator also found Plaintiff Byron Christiansen was not "legally entitled" to recover benefits for lost wages. This is all suggestive that there was no breach of contract. This is further corroborated by the arbitrator retaining jurisdiction over the matter in the event Mr. Christiansen didn't have surgery, suggesting then that if he failed to show "legal entitlement" to UIM benefits there could be no breach of contract or bad faith.

A finding of "legal entitlement" to UIM benefits does not mean that a breach of contract has now occurred. In order to have a breach of contract, as one of the essential elements, Plaintiffs must show damages. In this regard, the only potential damage would be attorney's fees. The significance of this is that the insurance policy expressly provides that attorney's fees incurred in connection with an arbitration proceeding to determine "legal entitlement" to UIM

benefits are to be paid by the party incurring them. Absent any evidence of damages, and in light of the express contractual provisions stating that attorney's fees incurred in connection with establishing "legal entitlement" to UIM benefits, an award of attorney's fees would not be appropriate. It follows then, that if the only damage Plaintiffs can show is attorney's fees, and that is expressly excluded from the contract, there can be no breach of contract.

Finally, in the analysis of an insured's claim against his insurer, a determination that the insured is "legally entitled" to UIM benefits and a finding that the insurance company has breached its insurance contract, does not establish that the insurer breached the implied covenant of good faith and fair dealing. It is well established under Utah case law that: "If the evidence presented creates a factual issue as to the claim's validity, there exists a debatable reason for denial, thereby legitimizing the denial of the claim, and eliminating the bad faith claim." *Callioux v. Progressive Ins. Co.*, 745 P.2d 838, 842 (Ut. App. 1987). If a plaintiff's claim is fairly debatable, an insurance company should not be found to have breached the implied covenant of good faith and fair dealing. This suggests that if Plaintiffs first show "legal entitlement", then breach, they still have to provide evidence of bad faith. This is especially the case since the defense to a bad faith claim is whether the claim was arguably "fairly debatable".

ARGUMENT

POINT I

PLAINTIFFS MUST SHOW "LEGAL ENTITLEMENT" TO THE UIM BENEFITS

The insurance policy in effect at the time of the loss determines whether there is coverage. *Prince v. Bear River Mut. Ins. Co.*, 56 P.3d 524, 532 (Ut. 2002). In this regard, the Farmers policy, specifically the provisions for UIM benefits, provides as follows:

> We will pay all sums which an insured person is legally entitled to recover as damages from the owner or operator of an underinsured motor vehicle because of bodily injury sustained by the insured driver while occupying your insured car.

(Second Edition, E-Z Reader Car Policy, Utah p. 8). (Emphasis added)

This provision is consistent with Utah law, U.C.A. §31A-22-305(9)(a), which provides for underinsured motorist coverage "for covered persons who are "legally entitled to recover damages from owners or operators of underinsured motor vehicles because of bodily injury, sickness, disease, or death." (Emphasis added.)

The meaning of "legally entitled" to recover damages has been addressed in numerous Utah decisions. Further, case law in other jurisdictions suggests that this can be decided as a matter of law. *Nationwide Mutual Ins. Co. v. Nacchia*, 628 A.2d 48 (Del. 1993); *Farmers Alliance Mutual Ins. Co. v. Holeman*, 961 P.2d 114 (Mt. 1998). The Utah Supreme Court addressed the "legally entitled" to language for the first time in the case of *Lyon v. Hartford Accident & Indemnity Co.*, 480 P.2d 739 (Ut. 1971) (overruled on other grounds by *Beck, supra*).

In *Lyon*, the Utah Supreme Court interpreted the "legally entitled" to language of an uninsured motorist provision of an insurance policy and stated that the insurer's obligations "did not arise until there was a legal determination of the liability of the uninsured motorist and the extent of the damages sustained." *Id.* at 744.

The Utah Supreme Court addressed this issue again in *Lima v. Chambers*, 657 P.2d 279 (Ut. 1982) where, in the context of an uninsured motorist policy, it held that:

> . . . [t]his showing of legal entitlement typically entails a lawsuit against the uninsured tortfeasor to litigate the issues of liability and damages. A judgment favorable to the insured fixes the insurer's contractual duty to satisfy that judgment, within the policy limits.

Id. at 281.

In 1996, the Utah Court of Appeals interpreted "legally entitled" to within the context of underinsured motorist coverage in the case of *Peterson v. Utah Farm Bureau Ins. Co.*, 927 P.2d 192 (Ut. App. 1996), where the court held that the insurer's obligation under UM and UIM statutes (which are construed identically by the court in this context) did not arise until there is "'a legal determination of liability of the [under-] insured motorist and the extent of the damages sustained.'" 927 P.2d 192, 196, citing *Lyon*, 480 P.2d at 745. That legal determination is a favorable judgment which fixes the insurance company's contractual duty.

More recently, the Utah Court of Appeals considered the "legally entitled" to recover language of uninsured and underinsured motorist coverage in *Estate of Berkemeir ex rel. Nielsen v. Hartford Ins. Co. of Midwest*, 67 P.3d 1012 (Ut. App. 2003). Relying on the Utah Supreme

Court's decision in *Lieber v. ITT Hartford Ins. Ctr.*, 15 P.3d 1030 (Ut. 2000), the court of appeals chose not to adopt the more rigorous standard previously set forth in *Peterson, Lima* and *Lyon*, but rather elected to use a less vigorous standard where the party need only show the existence of a "viable claim that is *able* to be reduced to judgment". *Id.* at 1015. (Court's emphasis.) Absent specific language to the contrary, such a showing is sufficient. This showing can be made "with either a judgment entered by the trial court, or a formal, or informal, settlement agreement between the parties." This appears to be a distinction without a difference.

In the *Berkemeir* case, the insurance company had agreed to settle the claim for uninsured motorist coverage. The insurance company also informally acknowledged that the plaintiff's injuries exceeded the uninsured motorist coverage, and agreed to determine the amount due under UIM coverage through arbitration. When the plaintiff then died, the insurance company reneged on the agreement to arbitrate.

In the case pending before the court, there had been no formal or informal settlement agreement between Farmers and the Christiansens. Farmers had agreed to allow the Christiansens to enter into a settlement agreement with the tortfeasor's carrier, but had not admitted that the value of Plaintiffs' claim exceeded the amount which had already been paid to them by the tortfeasor's carrier. Farmers sought to compel the Plaintiffs to resolve their claim for UIM benefits in arbitration pursuant to the provisions of the insurance policy and to stay the causes of action for breach of contract and bad faith pending a determination of whether Plaintiffs were found to be "legally entitled" to UIM benefits in arbitration. Farmers argued that

its duty to pay any UIM benefits did not arise until there had been a determination of Plaintiffs' "legal entitlement" to UIM benefits in arbitration (since the parties could not agree as to the value of Plaintiffs' claims). Farmers argued that such a showing of "legal entitlement" to the contract benefits, in turn, was a prerequisite to determining whether a breach of contract had occurred, a prerequisite to maintaining a cause of action for bad faith.

A. Under the *Beck* Case, Plaintiffs Must Still Establish "Legal Entitlement"to UIM Benefits Before Pursuing a Bad Faith Claim.

Relying on the decision of this Court in *Beck, supra*, Plaintiffs argue that they are not required to establish that they are "legally entitled" to UIM benefits before pursuing their claim for bad faith. Although the *Beck* decision does state that under certain circumstances, a refusal to bargain or settle, standing alone, may be sufficient to prove bad faith, it does so in the context of the claimant in that case having already been determined to be "legally entitled" to uninsured motorist benefits, a prerequisite to maintaining a cause of action for bad faith. Because such a showing had not yet been made in this case, Farmers sought to stay Plaintiffs' claims for breach of contract and bad faith.

In *Beck*, claimant made a policy limits demand for uninsured motorist benefits. The insurance adjuster rejected the policy limits demand and the claimant then filed a lawsuit against his own insurance carrier, alleging breach of the contract for refusing to pay his UM claim and that, by refusing to investigate the claim, bargain with its insured, or settle, the insurance company also breached the implied covenant of good faith and fair dealing (bad faith). Claimant

also alleged emotional distress. In *Beck*, the trial court bifurcated the case and agreed to try the claim for failure to pay UM benefits independent of the bad faith claim. Subsequently, the claimant and the insurance company agreed to settle the UM claim and that claim was dismissed. Settlement of the claimant's UM claim established his "legal entitlement" to the UM benefits under the contract. *Estate of Berkemeir, supra*. The trial court then addressed the bad faith claim.

It should also be noted that *Beck* differs from this case in that *Beck* involved a claim for uninsured motorist benefits. The plaintiff in *Beck* claimed that he was forced to accept a settlement of his uninsured motorist claim because he had essentially received nothing on behalf of the uninsured tortfeasor. Plaintiffs in this case had, in fact, already been paid $50,000 on behalf of the tortfeasor in addition to the no-fault benefits paid by Defendant and were seeking additional amounts in UIM benefits. Defendant, in invoking the arbitration provisions of its policy with Plaintiffs, maintained that Plaintiffs had not established that they were entitled to additional compensation for any losses which they may have sustained or, if they were entitled to additional compensation, how much they were entitled to. The "certain circumstances" which might exist in a claim for uninsured motorist benefits like *Beck*, where a refusal to bargain or settle, standing alone, might be sufficient to prove bad faith, simply do not exist in this case.

The *Beck* decision does not alter the fact that Plaintiffs must first establish that they are "legally entitled" to UIM benefits. This is also supported by the Utah Supreme Court's decision in *Chatterton*. In that case, the plaintiff sought materials in discovery which were perhaps

relevant to a bad faith claim against the insurance company. In rejecting the plaintiff's efforts to obtain such materials, the court stated "[a]s it has not yet been determined whether State Farm is liable for payment under the uninsured motorist provision, there is no ground upon which to construct a case against State Farm for bad faith." (Emphasis added, citing *Beck* as support for this proposition, *Id.* at 263.) In relying upon *Beck*, the court in *Chatterton* refused to allow discovery in a potential bad faith claim absent first showing that plaintiff was "legally entitled" to benefits alleged under the insurance contract.

Finally, Plaintiffs' position that Defendants' failure to respond to their settlement demand is automatically bad faith, seemingly creates an independent tort and ignores the language in *Beck*, which is undisputed, that a first party relationship is considered a contractual one, not one in tort. Further, it seems to suggest that there can be strict liability for bad faith, which would negate the "fairly debatable" defense. (*Prince v. Bear River Mutual Insurance Company*, 56 P.3d 524, 535 (Ut. 2002). (See also point IV(A)).

POINT II

PLAINTIFFS' CLAIM FOR BAD FAITH SHOULD HAVE BEEN STAYED PENDING SHOWING A BREACH OF CONTRACT

According to the contract and Utah law, Farmers' duty to pay benefits under the contract did not arise until Plaintiffs established that they were "legally entitled" to recover the benefits. Because the parties in this case could not agree as to the value, if any, of Plaintiffs' UIM claims,

the contract specified that Plaintiffs were required to establish their "legal entitlement" to UIM benefits through arbitration. Farmers' duty to pay did not arise until the arbitrator determined that Plaintiffs were "legally entitled" to benefits under their insurance policy. While the trial court properly ordered the determination of "legal entitlement" to UIM benefits to be made in arbitration and stayed Plaintiffs' claim for breach of contract, it erroneously permitted the bad faith claim to proceed. The trial court's action failed to take into account that the bad faith claim in this case is a contract, not a tort claim, so that any claim for bad faith is predicated first on showing "legal entitlement" to the benefits and, further, that the contract has been breached.

The Supreme Court in *Beck, supra*, distinguished between a first and third party relationship, finding that a first party relationship, i.e. between the policyholder and the insurance company, is contractual. Under *Beck*, this meant that an insured could not bring an action for bad faith against his or her insurer, until a breach of that contract was established. Although the *Beck* decision did contain language holding that the refusal to bargain or settle, standing alone, may, under appropriate circumstances, be sufficient to prove a breach of the duty of good faith and fair dealing implied in all contracts, this does not mean that in a first party relationship bad faith can exist as an independent tort, especially since a defense to a claim of bad faith is whether the refusal to bargain or settle is "fairly debatable". It is important to remember that, in *Beck*, the claimant was already determined to be "legally entitled" to uninsured motorist (UM) benefits, a prerequisite to maintaining a cause of action for breach of contract and bad faith.

It is clear that the insureds may not just simply file a bad faith claim without having first established that they are "legally entitled" to the contract benefits and, second, that the insurance company breached the contract. See the Utah Supreme Court's holding in *Chatterton, supra,* in which the court rejected the effort of a claimant to obtain discovery relevant only to a bad faith action from his own insurance carrier in connection with his claim for uninsured motorist benefits. In this regard, the Utah Supreme Court refused to permit the claimant to obtain "extensive discovery that he has conceded is primarily directed at exploring the possibility of pursuing a bad faith claim" against his uninsured motorist carrier. The court stated: "[a]s it has not yet been determined whether State Farm is liable for payment under the uninsured motorist provision, there is no ground upon which to construct a case against State Farm for bad faith." (Emphasis added.) (Citing *Beck* as support for this proposition.) *Id.* at 263.

Defendant's position that there must be a showing of breach of contract and not just a failure by Defendant to pay what Plaintiff has demanded, is supported by cases in other jurisdictions as well. These decisions reiterate that Plaintiffs must first establish that the insurance contract has been breached before they are entitled to pursue their claim for bad faith.

In *Imperial Casualty and Indemnity Co. v. Bellini*, 746 A.2d 130 (R.I. 2000), the insurance company sought to sever the bad faith claim from the claim for insurance coverage and to limit discovery sought in connection with the bad faith claim. The Rhode Island Supreme

Court agreed to sever the coverage issues from the bad faith issues finding that the discovery sought in connection with the bad faith claim should be deferred until plaintiff had established the underlying breach of contract claim. In reaching this decision the court cited to its decision in *Bartlett v. John Hancock Mutual Life Ins. Co.*, 538 A.2d 997 (R.I. 1988), wherein the court stated:

> There can be no cause of action for an insurer's badfaith [sic] refusal to pay a claim until the insured first establishes that the insurer breached its duty under the contract of insurance. . . . If the insurer prevails on the breach of contract action, it could not, as a matter of law, have acted in bad faith in its relationship with its policyholder. There cannot be a showing of bad faith when the insurer is able to demonstrate a reasonable basis for denying benefits.

Bartlett at 1000.

Moreover, the Rhode Island court agreed with the reasoning in *Bartlett* that "allowing full disclosure of the insurer's claims file based solely on plaintiff's allegation of bad faith would invite all plaintiffs to include a bad faith claim with every breach of contract claim." *Id.* at 134 (citing *Bartlett*). The Rhode Island Supreme Court did acknowledge that the claims file may provide information to prove a bad faith claim, but determined that the need for this information "is outweighed first by the insurer's right to defend itself against the breach of contract claim and second by the fact that a bad faith claim cannot be maintained until the plaintiff proves that the insurer breached its contract of insurance." *Id.* at 135.

In *O'Malley v. U.S. Fidelity & Guar.*, 776 F.2d 494 (U.S.C.A. 5th Cir. Miss. 1985), O'Malley brought suit against his insurance company, alleging breach of contract and bad faith

by failing to properly investigate the claim and pay for losses. The insurer denied liability pursuant to an exclusionary clause in the insurance contract. The district court bifurcated the trial, hearing evidence and testimony only on the issue of whether the losses were covered by the policy because plaintiff could not have recovered on the bad faith claim unless he prevailed on the contract claim. O'Malley appealed and the Fifth Circuit Court of Appeals upheld the decision to bifurcate, reasoning that " . . . recovery on the bad faith claim would not have been possible unless O'Malley prevailed on his coverage claim." *Id.* 501.

In *South Hampton Refining Co. v. National Union Fire Ins. Co.* 875 F. Supp. 382 (E.D. Tex. 1995) plaintiff brought claims against National Union for breach of contract, negligence, breach of the implied covenant of good faith and fair dealing, and violations of the Texas Insurance Code. With respect to these claims, the court determined that severance was appropriate and, in doing so, the court held that "in insurance coverage suits, a plaintiff's bad faith claims generally depend on the outcome of contractual coverage claims and are usually severed." *Id.* 384. More specifically:

> The court also noted that plaintiff's bad faith claims, a violation of the Insurance Code claims and Deceptive Trade Practices Act claims all depended on the outcome of the contractual coverage dispute. (cit.) The court further ordered an abatement of all other claims pending resolution of the contractual coverage issues . . .

Id. at 384 (citing with approval *U.S. Fire Ins. Co. v. Millard*, 847 S.W.2d 668, 672 (Tex. App.-Houston [1st Dist.] 1993)) (emphasis added).

A series of cases in Florida asserting a statutory action for bad faith against an insurance company have held that it is premature to file such an action for bad faith until there has been a determination of liability and the extent of damages owed on the first party insurance contract. The Florida Supreme Court, addressing questions of Florida law certified by the United States Court of Appeals for the Eleventh Circuit held that an insured's claim against his uninsured motorist carrier's failure to settle his uninsured motorist claim in good faith did not accrue before the conclusion of the underlying litigation for the contractual uninsured motorist benefits. A series of subsequent Florida district court decisions reiterated this point and held that the bad faith claims raised by insureds against their insurance company for failure to settle should alternatively be dismissed without prejudice or abated pending resolution of the coverage issues. Moreover, these decisions halted discovery related to issues pertaining to the insured's claim of bad faith against their insurance companies. *See Liberty Mut. Ins. Co. v. Farm, Inc.*, 754 So.2d 865 (Fla. App. 3 Dist. 2000) where the court held that bringing an action for statutory bad faith was premature before a determination of coverage and the amount of damages owed under the policy (citing *Vest v. Travelers Ins. Co.*, 753 So.2d 1270, 1276 (Fla. 2000)). *See also General Star Indem. Co. v. Anheuser Busch Companies, Inc.*, 741 So.2d 1259 (Fla. App. 5 Dist. 1999) (comparing a third party bad faith to first party bad faith cause of action and reiterating the necessity of resolving coverage and liability issues first and that no discovery on the bad faith claim should proceed until coverage has been resolved); *Allstate Ins. Co. v. Baughman*, 741 So. 2d 624 (Fla. App. 2 Dist. 1999) (the statutory bad faith claim for failure to settle an insurance

claim should have been dismissed without prejudice or, alternatively, abated); and *Doan v. John Hancock Mut. Life Ins. Co.*, 727 So.2d 400 (Fla. App. 3 Dist. 1999) (resolution of coverage dispute on disability insurance claim necessary before deciding bad faith claim). *See also Talat Enterprises, Inc. v. Aetna Life and Cas.*, 952 F. Supp. 773 (M.D. Fla. 1996); *Michigan Millers Mut. Ins. Co. v. Bourke*, 581 So.2d 1368 (Fla. App. 2 Dist. 1991); and *Allstate Ins. Co. v. Melendez*, 550 So.2d 156 (Fla. App. 5 Dist. 1989).

In the case of *Walden v. Nationwide Ins. Co.*, 951 P.2d 949 (Id. 1998), the insured brought a cause of action against her uninsured motorist carrier for breach of contract and bad faith. The insured had submitted a "proof of loss" to her insurer and demanded the policy limits under the UM portion of her policy. The insurer responded and indicated it did not believe her claim was a limits case and demanded arbitration. The insurance company advised plaintiff's counsel of the name of the arbitrator it wished to designate. The plaintiff, however, did not designate her own arbitrator but instead filed suit against the insurance company alleging breach of contract for failing to pay "an amount justly due." The policy contained a similar provision to that contained in the Farmers policy issued to Plaintiffs in this case, providing for "arbitration in the event that the insurance company and the insured do not agree about the insured's right to recover damages or the amount of the damages." The court found that the insurance company was entitled, pursuant to the terms of its policy, to have the amount of damages determined in

arbitration. It held that the insurance company was not in breach of contract and did not act in bad faith in relying on the contractual provisions for arbitration.

The Federal District Court in Nevada in the case of *Martin v. State Farm Mut. Auto Ins. Co.*, 960 F. Supp. 233 (D. Ne. 1997), reviewed Nevada case law and that of other jurisdictions involving uninsured motorist coverage and bad faith claims and found that a majority of jurisdictions hold that a bad faith claim either does not exist or should be held in abeyance until there is a final resolution of the contractual coverage claim. Citing, for example, *Blanchard v. State Farm Mut. Ins. Co.*, 575 So.2d 1289 (Fla. 1991).

Similar decisions have been reached by the Court of Appeals in Georgia. In the case of *Wallis v. Cotton States Mut. Ins. Co.*, 354 S.E.2d 842 (Ga. App. 1987), the parents of a man who died from injuries incurred in a collision with an uninsured motorist filed a demand for payment with their son's uninsured motorist carrier. Georgia's bad faith statute required uninsured motorist benefits to be paid within 60 days after demand for payment was made, However, the court held that the insurer was not liable for bad faith penalties for failure to pay within the 60 days where the demand was made prior to entry of judgment against the uninsured motorist, but noted that since the insurer is liable for the amount which the insured "shall be legally entitled to recover" from the uninsured motorist, liability for damages "should be ascertained in an appropriate forum before bringing the suit against the insurance company under such coverage." *Id.* at 843. It further stated that:

> . . . an insurer has no duty to accept an insured's demand for payment of a claim prior to judgment being entered against an uninsured motorist. Inasmuch as the insurer is not required to make payment or settlement, it defies logic to argue that [the insurer] could have acted in bad faith in failing to pay the claim prior to judgment in the tort case.

Id. at 843 (citing *Allstate Ins. Co. v. McCall*, 305 S.E.2d 413 (Ga. App. 1983). *See also Jones v. Cotton States Mut. Ins. Co.*, 363 S.E.2d 303 (Ga. App. 1987).

The Utah Supreme Court's decision in *Chatterton* firmly establishes that Plaintiffs in this case could not pursue their cause of action for breach of the implied covenant of good faith and fair dealing (bad faith) until they had established that they were "legally entitled" to the contract benefits. In addition, for the reasons set forth in Point III below, pending a showing by Plaintiffs that they are first "legally entitled" to benefits under the contract and, second, that there has been a breach of contract, the claim for bad faith should be stayed since failure to do so is not only improper but also prejudices the insurance company.

POINT III

DISCOVERY IN A BAD FAITH ACTION IS INAPPROPRIATE UNTIL PLAINTIFFS HAVE SHOWN THAT THEY ARE "LEGALLY ENTITLED" TO UNDERINSURED MOTORIST BENEFITS

In this case, in connection with their efforts to establish a claim for bad faith against Defendant, Plaintiffs have sought information pertaining to the liability and valuation which Defendant might have made concerning Plaintiffs' UIM claim. This information, if produced prior to the determination of Plaintiffs' "legal entitlement" to UIM benefits, prejudices Defendant in the then still-pending arbitration. In seeking the stay of the bad faith action and protection

from Plaintiffs' discovery requests, Defendant had argued that since Plaintiffs' entitlement to UIM benefits and if, in fact, entitled to such benefits, how much they were entitled to, had yet to be resolved, Defendant should not be prejudiced in the resolution of Plaintiffs' UIM claims by being forced to proceed with the discovery requests made in connection with Plaintiffs' bad faith claim against Defendant. As noted by this court in *Beck, supra*, Defendant argued that with regard to Plaintiffs' first party claim for UIM benefits, Plaintiffs and Defendant were "in effect and practically speaking, adversaries." *Id.* 799.

The court's decision in *Chatteron, supra*, made clear that discovery in a bad faith case is inappropriate until Plaintiffs have shown "legal entitlement" to the contract benefits. As indicated earlier, the court there refused to allow plaintiff's discovery requests directed at exploring the possibility of a bad faith claim against an insurance company until it was first determined that the insurance company was liable under the uninsured motorist provisions of its policy.

The position taken by the court in *Chatterton, supra*, is consistent with that taken by the Texas Court of Appeals in *State Farm Mut. Auto Ins. Co. v. Wilborn*, 835 S.W. 2d 260 (Tex. Ct. App. 1992), wherein the court addressed issues raised by trying an uninsured motorist claim with a claim for bad faith and an insurance company's plea to abate the bad faith claim until the uninsured motorist claim was resolved. The court recognized that information pertaining to offers of settlement and compromise would be inadmissible under Rule 408 of the Texas (and Utah) Rules of Evidence in the resolution of an uninsured motorist claim, yet this same

information was sought as the basis for plaintiff's bad faith claim against defendant. The court noted that information such as offers to settle sought in connection with bad faith litigation would not be admissible in connection with resolution of an uninsured motorist claim since the basic rule that settlement offers are not admissible to show liability for or the invalidity of a claim or its amount would be violated. In order to allow both the claim for UIM benefits and the claim for bad faith to be fully and fairly litigated, the court reversed the trial court's decision and severed the two causes of action, abating all proceedings on the bad faith cause of action until final disposition on the uninsured motorist claim. *See also Mid-Century Ins. Co. of Texas v. Lerner*, 901 S.W. 2d 749 (Tex. Ct. App. Houston [1st Dist.] 1995), wherein the Texas Court of Appeals held that "the breach of contract claim and the extracontractual bad faith claims must be severed. In addition, the bad faith claims must be abated until the breach of contract issue is finally resolved for all purposes." *See also U.S. Fire Ins. Co. v. Millard*, 847 S.W. 2d 668 (Tex. Ct. App. Houston [1st Dist.] 1993) wherein the court "directed the trial court to sever and abate all proceedings on the bad faith claims pending full and final resolution of plaintiff's uninsured motorist claim." *Id.* 676. *See also Texas Farmers Ins. Co. v. Stem*, 927 S.W. 2d 76, 80 (Tex. Ct. App. Waco 1996) wherein the court agreed with the holding in *Wilborn* and determined that the defendant [insurance company] "would necessarily be prejudiced in his defense of the plaintiff's contract claim if evidence of settlement offers was admitted" and, for this reason, upheld the holding in *Wilborn* (wherein they agreed with the bifurcation of the entitlement to underinsured

motorist benefits from the bad faith claim and abated all proceedings of the bad faith pending a final disposition of the underinsured motorist claim.) Part of the reason for doing so was predicated on the admission of evidence possibly relevant to a bad faith action, but that would be highly prejudicial in a determination of UIM benefits. Specifically referred to were offers of settlement, which may establish an admission of liability, as well as value.

In the case of *General Star Indemnity Co. v. Anheuser Busch, Inc., supra*, the Florida Court of Appeals noted that for both first and third party bad faith claims against insurers, coverage and liability issues must be determined before bad faith can be prosecuted. It noted that "failure to follow this procedure would, in effect, reverse the established case law that discovery of an insured's claim file is not permissible until the insured's obligation to provide coverage has been established" and that the insurer would be "irreparably harmed" by having to litigate the bad faith claim with the coverage claim because the evidence used to prove the bad faith claim would prejudice "the coverage issue." *Id.* at 1261. Discovery was similarly stayed in *Michigan Millers Mutual Ins. Co. v. Bourke, supra*, in which the court found that a claim for bad faith did not accrue until after liability and damages were determined in the underlying contractual litigation and abating the bad faith claim against the uninsured motorist carrier, and quashed the order compelling discovery of the insurance company's claims file.

The inherent prejudice resulting from the trial court's refusal to stay the bad faith litigation in this case, and ordering Defendant to respond to discovery sought in connection with

the bad faith claim prior to resolution of the UIM claim was demonstrated in this case. Plaintiffs sought the claims file which contains the thoughts and impressions of the claims handlers and has information concerning liability and damages, as well as information regarding settlement value, including the reserves set. Defendant was in the untenable position of having to comply with the court's order that it produce responses to discovery which would be used by Plaintiffs to then bolster their showing of "legal entitlement" to UIM benefits. This is exactly the prejudice sought to be avoided by staying litigation in the bad faith claim until the UIM claims were resolved. Defendant, an insurance company against whom a bad faith claim was asserted, should not have been required to comply with discovery requests which may have been proper in connection with their bad faith claim, but which addressed issues concerning settlement and valuation of the claim, as well as liability, and which would not be discoverable in connection with the UIM claims. Discovery should not be held on those issues until Plaintiffs first established that they were "legally entitled" to receive UIM benefits under the insurance contract and then establish breach of that contract.

POINT IV

DETERMINATION OF LEGAL ENTITLEMENT BY THE ARBITRATOR DOES NOT ESTABLISH THAT DEFENDANT BREACHED THE INSURANCE CONTRACT OR THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

Inasmuch as the arbitration award issued after this Court granted Defendant's Petition to Appeal Interlocutory Order established Plaintiffs' "legal entitlement" to UIM benefits, it is

important for this Court to outline the required analysis to be made after a finding of "legal entitlement" to benefits under the policy. Because Plaintiffs have now been awarded UIM benefits in the December, 2003 arbitration, this does not establish that Defendant breached the insurance contract or that Plaintiffs are entitled to recover on their claim for bad faith. As indicated earlier, the contract between the parties, the insurance policy issued by Farmers to Plaintiffs, provided that Farmers pay UIM benefits to its insureds who were "legally entitled" to recover damages from the owner or operator of an underinsured motor vehicle. The policy further provided for arbitration to establish "legal entitlement" to underinsured motorist benefits when such benefits could not be agreed upon among the parties. The insurance policy issued to Plaintiffs provides as follows:

> If an **insured person** and we do not agree (1) that the person is legally entitled to recover **damages** from the owner or operator of an **uninsured motor vehicle** or **underinsured motor vehicle**, or (2) as to the amount of **damages** Uninsured or Underinsured Motorist Coverage, either party may make a written demand for arbitration.
>
> In that event, both parties will agree on one arbitrator. If they cannot agree within 30 days, either may request that selection be made by a judge of a court having jurisdiction. We will pay the costs of the arbitrator. Attorney's fees and fees paid for the witnesses are not expenses of arbitration and will be paid by the party incurring them.
>
> . . .
>
> The arbitrator will determine (1) the existence of an **uninsured** or **underinsured motor vehicle**, (2) that the **insured person** is legally entitled to recover damages from the owner or operator of

> an **uninsured motor vehicle**, and (3) the amount of payment under this part as determined by this policy or any other applicable policy. . . .

In this case, the parties could not agree as to Plaintiffs' "legal entitlement" to UIM benefits or, if entitled, the amount. As evidenced by the arbitrator's award in this matter, the arbitrator was unclear as to what caused Plaintiff Byron Christiansen's relapse several months subsequent to the accident in question. Moreover, his decision indicates that Plaintiff was not "legally entitled" to recover underinsured motorist benefits until the determination to have surgery was made. (No indication is given as to when this determination was made. However, the surgery was apparently scheduled to take place sometime during the week after the December 8, 2003 award was issued.) The arbitrator devised a formula for apportioning the proximate cause of Plaintiff's injuries and surgery to the various possible causes and applied that percentage to the cost of Plaintiff's surgery and the resulting general damages associated with Plaintiff undergoing that surgery. Although there was no confirmation that Plaintiff did, in fact, elect to undergo the surgery, Farmers promptly paid Plaintiffs' claim for UIM benefits.

The facts as they have been developed at this point do not suggest that there has been any breach of contract by Farmers. Plaintiffs were required to produce evidence that they were "legally entitled" to recover UIM benefits. The record contains no evidence that they satisfied their burden of establishing "legal entitlement" until the arbitrator issued his award on December 8, 2003. In fact, the arbitrator's decision indicates that Plaintiffs failed to establish "legal

entitlement" to compensation for lost wages, evidence of which Farmers counsel had evidently been seeking from them since the fall of 2002 when he was first retained to handle the claim. Moreover, according to the arbitrator, the settlement from the liability carrier was "a reasonable amount to settle the case prior to the determination to have surgery."

Not persuaded that Plaintiffs had established their "legal entitlement" to UIM benefits, Farmers invoked the arbitration provision pursuant to its insurance contract with Plaintiff. Plaintiffs agreed to arbitrate the claim and were awarded and promptly paid UIM benefits pursuant to the arbitrator's decision. There is no evidence of any breach of contract by Farmers. An insurance company is not required to pay every claim submitted to it.

A. Plaintiffs Cannot Establish the Elements to Show Breach of Contract.

One of the necessary elements to establish a breach of contract is damages. In this regard, arguably the only damages Plaintiffs can claim are attorney's fees in having to arbitrate their claim to show "legal entitlement" to the UIM benefits. It should be noted that the insurance policy expressly provides that any attorney's fees incurred in connection with an arbitration proceeding to determine "legal entitlement" to UIM benefits would be paid by the party incurring them. This is important because the remedy for breach of the express terms of an insurance contract has been deemed in some Utah cases to include foreseeable attorney's fees. (*Canyon Country Store v. Bracey*, 781 P.2d 414 (Ut. 1989); *Billings v. Union Bankers Ins. Co.*, 918 P.2d 461 (Ut. 1996)). Although Utah cases have awarded foreseeable attorney's fees as consequential

damages flowing from an insurer's breach of the express terms of an insurance contract, Defendant maintains that it has not breached the contract, that attorney's fees incurred because Plaintiffs failed to produce evidence to establish their "legal entitlement" to UIM benefits were not contemplated at the time the parties entered into the insurance contract, and, most importantly, if any fees were awarded, the court would be rewriting the insurance policy to require the insurer to assume attorney's fees incurred by the insureds in producing evidence of "legal entitlement" to benefits, notwithstanding that the contract expressly provides otherwise. This being the case, Plaintiffs do not show that they have been damaged, and therefore cannot meet the elements to show that the insurance contract has been breached. If there is no breach of contract, there can be no bad faith claim.

B. The Arbitration Award Does Not Establish Breach of the Implied Covenant Of Good Faith And Fair Dealing (Bad Faith).

The arbitrator's award of UIM benefits to Plaintiffs in this case does not establish that Defendant breached the implied covenant of good faith and fair dealing any more than it establishes that it breached the insurance contract. It is well established under Utah case law that "if the evidence presented creates a factual issue as to the claim's validity, there exists a debatable reason for denial, thereby legitimizing the denial of the claim, and eliminating the bad faith claim. 'When a claim is fairly debatable, the insurer is entitled to debate it, whether the debate concerns a matter of fact or law.'" *Callioux v. Progressive Ins. Co.*, 745 P.2d 838, 842 (Ut. App. 1987) (quoting *McLaughlin v. Alabama Farm Bureau Mut. Cas. Ins. Co.*, 437 So.2d

86, 90 (Ala. 1983)). *See also Prince v. Bear River Mutual Ins. Co.*, 56 P.3d 524, 535 (Ut. 2002), where the court held that if an insured's claim is "fairly debatable", then the insurer is entitled to debate the claim and "cannot be held to have breached the implied covenant if it chooses to do so." (citing *Morris v. HealthNet of California, Inc.*, 988 P.2d 940 (Ut. 1999); *Billings v. Union Bankers Ins. Co.*, 918 P.2d 461, 465 (Ut. 1996); *Callioux v. Progressive Ins. Co., supra* at 842.)

In *Prince, supra*, an insured brought an action for breach of contract, bad faith, intentional infliction of emotional distress, fraud, and tortious violation of public policy against his automobile insurer because the insurance company, relying on an independent medical examiner's report that continued chiropractic care was not medically necessary, discontinued PIP payments to the insured. Finding that there was a factual issue as to the validity of the plaintiff's claims for continued PIP benefits, the court held that the claim was "fairly debatable" and the denial of benefits did not "constitute a breach of the covenant of good faith and fair dealing as a matter of law." Quoting Couch on Insurance 3d §204:28 (1999), the court in *Prince* stated that "a debatable reason" for purposes of determining whether a first party insurer may be subjected to bad faith liability means "an arguable reason, a reason that is open to dispute or question." It further stated that "to be fairly debatable, evidence must establish that there is an arguable or debatable basis underlying the insurer's nonpayment or delayed payment of a claim." *Prince, supra* at 537.

This Court in *Billings v. Union Bankers Ins. Co.*, 918 P.2d 461 (Ut. 1996) examined whether a first party insurer could be held liable for breaching the implied covenant on the grounds that it wrongfully denied coverage if the insured's claim was later found to be proper. The court noted that if the insurer acted reasonably in dealing with their insureds, "it is entirely consistent . . . to hold that when an insured's claim is fairly debatable, the insurer is entitled to debate it and cannot be held to have breached the implied covenant if it chooses to do so." *Id.* 465. In a footnote, the court sought to clarify this in light of *Beck*, noting that although *Beck, supra,* stated that the "state of mind of the insurer is irrelevant; even an inadvertent breach of the covenant of good faith implied in an insurance contract can substantially harm the insured and warrants a remedy," this statement should not be read as suggesting that the covenant of good faith and fair dealing imposes a strict liability standard. The court stated that the language in the *Beck* decision did not mean that:

> if a claim is denied and a court later determines it should have been granted, the insurer is liable for breaching the implied covenant, regardless of how reasonable it was to deny coverage. On the contrary, this statement in *Beck* was intended only to disavow any implication that a "bad faith" state of mind is necessary to show a breach of the implied covenant, not to impose strict liability on insurers.

Id. 465.

The record here does not contain extensive facts concerning the underlying claim of Plaintiffs against Farmers. The file as it exists, however, does contain evidence that Plaintiffs' claim was "fairly debatable." The arbitrator's decision notes that Plaintiff Byron Christiansen had been paid $4,750 in lost wages by Defendant under the PIP portion of his insurance policy.

The record on pages 76-80 indicates that income tax returns sought by Farmers to evaluate Plaintiffs' claim for UIM benefits were belatedly provided on the morning of Plaintiff's scheduled sworn statement. The arbitrator's decision notes in paragraph 7 that "petitioner has not proven an income loss in the past or future as a result of the motor vehicle accident." The arbitrator's decision states in paragraph 5 that "the settlement from the liability carrier is a reasonable amount to settle the case prior to the determination to have surgery." When Plaintiff made his determination to have surgery is not indicated in the award, but it does note that the surgery was scheduled for the week following the December 8, 2003 arbitration award. The award also provides a rather detailed description of Plaintiff's pre-existing non-symptomatic degenerative condition at the time of the accident, the accident exacerbating the degenerative condition, causing it to become symptomatic, Plaintiff's improvement with conservative care, and then his significant relapse due to reasons which were unclear to the arbitrator but which may have included "a long airplane ride, too much activity at a wedding reception, or coughing from pneumonia." According to the arbitrator, "any of these events could have triggered the relapse and each may be as traumatic as this very minor automobile collision." The court then devises a formula for apportioning the proximate cause of Plaintiff's injuries among his pre-existing condition, the unclear triggering mechanism of July, 2001 and the subject automobile accident. The fact that Plaintiff failed to establish any claim for additional lost wages, that until he made a determination to have surgery he had been fully compensated by the settlement with the insurer of the underlying tortfeasor, and that the surgery to address his ongoing pain followed an unclear

triggering mechanism subsequent to the motor vehicle accident are all evidence that this claim was "fairly debatable" and that Defendant was therefore entitled to fairly debate the claim.

In *Prince, supra*, the court outlined the implied promises of good faith and fair dealing that both parties to an insurance contract make. The court stated that "under this covenant, the contracting parties each impliedly promise not to 'intentionally or purposefully do anything [that] will destroy or injure the other party's right to receive the fruits of the contract." *Id.* 533 (quoting *Brown v. Moore*, 973 P.2d 950, 954 (Ut. 1998)). It is also noted that under this covenant, the insurer was required to diligently investigate the facts to enable it to determine whether a claim is valid and to fairly evaluate the claim. It is apparent in this mutual covenant imposed on both parties to the contract that Plaintiffs must provide the evidence to support their claim for benefits. In this case, although Plaintiffs had claimed lost wages, they never successfully substantiated this claim. Moreover, the history of Plaintiffs discomfort was a rather complicated one with a relapse triggered by unclear mechanisms. Although the accident in question in this case occurred on May 10, 2001, surgery was not scheduled until December, 2003. The arbitrator noted that Plaintiff was not entitled to interest on the medical specials of $49,735 for surgical costs, as they had not yet been incurred. At the very least, Plaintiff's claim was still evolving at the time that it was filed with Defendant in August, 2002 and the diligence with which Defendant could evaluate Plaintiffs' claims was dependent in part on Plaintiffs timely providing information in support of their claim. Once the decision of the arbitrator was rendered on December 8, 2003, Defendant promptly paid the claim pursuant to its obligation under the contract.

In the case of *Callioux, supra*, the plaintiffs' insurer denied their claim for a total loss of their vehicle after its investigator and an arson expert concluded that the loss was caused by a fire. The claimant was subsequently charged with arson in connection with his alleged destruction of the Jeep and for his subsequent attempt to defraud an insurer. After a finding of probable cause, the claimant was bound over for trial. The jury found claimant not guilty, and the insurance company immediately paid the claim in full. In finding the insurance company acted in good faith, the court noted that upon the claimant's acquittal for arson and insurance fraud, the insurance company paid the claim in full. Similarly, in this case, the insurance company promptly paid the benefits owing once a finding of "legal entitlement" to the UIM benefits was made by the arbitrator, having debated a fairly debatable claim. It follows then, that an award from the arbitrator, standing alone, is not evidence of bad faith. Rather, in the claim here, which was "fairly debatable", Defendant should not be found to have breached the implied covenant of good faith and fair dealing. This also negates Plaintiffs' position that the controlling language in the *Beck* case, which suggests that an insurance company's refusal to bargain, and/or accept or reject a settlement, is bad faith. The case law clearly suggests that if the claim is deemed "fairly debatable" the insurance company is entitled to debate it and it forms an affirmative defense to Plaintiffs' allegations of bad faith.

Absent a breach of the express terms of the contract and absent a breach of the implied covenant of good faith and fair dealing, no damages are properly awardable. The UIM benefits

were promptly paid upon the arbitrator's determination of "legal entitlement." No interest was awarded as the special damages had not yet been incurred and attorney's fees incurred to produce evidence of "legal entitlement" are expressly excluded by the contract, are not provided for in the UIM statute, and were not contemplated at the time of contracting.

CONCLUSION

The trial court in this case was incorrect in allowing the bad faith claim against Defendant to proceed, before Plaintiffs showed that they were "legally entitled" to recover UIM benefits. Further, the trial court was incorrect in its ruling staying the breach of contract action and still allowing the bad faith action to go forward, since there must be a showing of breach of contract before a cause of action for bad faith can be maintained against the insurance carrier. It was also in error in allowing discovery which may be pertinent to a bad faith action to go forward, because it may cause discovery of information that may be relevant to a bad faith claim and highly prejudicial to the arbitration of the UIM claim. For example, the claims file would contain the thoughts and impressions of the claims handler, settlement authority, and the setting of reserves, all of which would assist Plaintiffs during the course of the arbitration to determine liability and damages.

The policy itself and Utah law offer a systematic process for analyzing claims filed by an insured against his or her insurance carrier. To ignore the requirements of this process by allowing claims for bad faith to be filed with every claim for UIM benefits would create a situation where insureds would find it advantageous to file a bad faith lawsuit while

simultaneously seeking UIM benefits, as well as attorney's fees, every time their demand was not met by an insurance company, notwithstanding the fact that they failed to fulfill their responsibilities to establish "legal entitlement" to such benefits under the contract.

Defendant therefore requests that this Court find that the claimant must first show "legal entitlement" to the benefits, and that a finding of "legal entitlement" does not equate with breach of contract or breach of the implied covenant. This being the case, Defendant requests that this Court grant a stay of the bad faith action, pending a determination of whether there has been a breach of contract. Defendant also requests this Court stay all discovery related to the bad faith claim pending resolution of the breach of contract claim.

DATED this 29th day of March, 2004.

Barbara L. Maw

BARBARA L. MAW
ANDREA C. ALCABES

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of March, 2004, two copies of the foregoing **BRIEF OF DEFENDANT/APPELLANT FARMERS INSURANCE EXCHANGE ON THE INTERLOCUTORY APPEAL FROM THE THIRD DISTRICT COURT, HONORABLE JOSEPH C. FRATTO, JR.** was mailed, first-class postage prepaid, to the following:

Scott D. Brown
Brian S. Coutts
NUTTALL, BROWN AND ASSOCIATES
6925 Union Park Center, Suite 210
Midvale, UT 84047-4198

Tobie Mitchell

INDEX TO ADDENDUM

Tab 1

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IN THE SUPREME COURT OF THE STATE OF UTAH

BYRON CHILD CHRISTIANSEN and MERRILEE CHRISTIANSEN, husband and wife, Plaintiffs/Respondents, vs. FARMERS INSURANCE EXCHANGE, Defendant/Petitioner.	**MOTION TO SET ASIDE PERMISSION FOR INTERLOCUTORY APPEAL DUE TO CHANGE IN CIRCUMSTANCES** Appellate Court No. 20030836-SC District Court No. 030908140

Plaintiffs/Respondents, Byron and Merrilee Christiansen, by and through their attorneys, submit this Motion to Set Aside Permission for Interlocutory Appeal due to a significant change in the circumstances on which the permission was based.

Attached as **Exhibit One** is a copy of Arbitrator Scott Daniels' Arbitration Award in the amount of approximately $75,000.00, dated December 8, 2003; together with Farmers' check and the fully executed Satisfaction of Arbitration Award.

Interestingly, notice of the above Award was received just the day after the Utah Supreme Court issued its December 10, 2003 Order (attached as **Exhibit Two**), granting permission to Petitioner Farmers to file an Interlocutory Appeal of Third District Court Judge Joseph Fratto's denial of Farmers' Motion to Stay the Bad Faith action, pending resolution of the Arbitration of the written contractual underinsured motorist claim. (Judge Fratto's Order attached as **Exhibit Three**).

It is Plaintiffs'/Respondents' understanding that the Arbitration Award renders moot any otherwise forthcoming Interlocutory Appeal. If there was any need to demonstrate "legal entitlement" to UIM benefits before proceeding on the bad faith claim, the substantial Arbitration Award satisfies that. The final resolution of the arbitration also removes any potential for one side of the case to prejudice the other. Furthermore, any urgency that may have warranted an interlocutory appeal no longer exists. In the Arbitration, Plaintiffs' prevailed on their cause of action for Farmers' breach of the written contractual underinsured motorist policy provisions. The only remaining claims are those in litigation for breach of the implied covenants of good faith and fair dealing (i.e., bad faith). Consequently, it would be a waste of this Court's resources to proceed to enforce a now meaningless stay, and to administer an Interlocutory Appeal which has now been rendered moot by virtue of the resolution of the Arbitration confirming Plaintiffs' "legal entitlement".

Based upon the foregoing, Plaintiffs'/Respondents' respectfully request that permission to pursue the Interlocutory Appeal be reversed, and that proceedings be allowed to go forward in the ordinary course in the breach of the contractual duties of good faith and fair dealing action pending before Judge Fratto in the Third Judicial District Court.

RESPECTFULLY SUBMITTED this 16th day of December, 2003.

SCOTT D. BROWN, ESQ.
NUTTALL, BROWN AND ASSOCIATES
Attorneys for Plaintiffs/Respondents
Byron and Merrilee Christiansen

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 16th day of December, 2003, a true and correct copy of the foregoing **MOTION TO SET ASIDE PERMISSION FOR INTERLOCUTORY APPEAL DUE TO CHANGE IN CIRCUMSTANCES** was mailed via First-Class Mail to the following:

Attorney Barbara L. Maw
Law Offices of Barbara L. Maw, P.C.
185 South State Street, Suite 340
Salt Lake City, UT 84111

Becky Duncan

EXHIBIT ONE

In the Matter of the Arbitration Between:

Byron Christiansen
and Merrilee Christiansen

-and-

Farmers Insurance

AWARD OF ARBITRATOR
Case number 03-A-084

The undersigned arbitrator, having been designated in accordance with the arbitration agreement signed by the parties and having duly heard the proofs and allegations of the parties,

FINDS AND AWARDS as follows:

1. Petitioner (hereinafter "Petitioner" will refer to Mr. Christiansen) was involved in a rear end motor vehicle accident on May 10, 2001. Respondent is the underinsured motorist carrier. The adverse driver's liability carrier paid its policy limit of $50,000. In addition PIP paid petitioner $3000 in medical payments and $4750 in lost wages.

2. Petitioner has incurred $15,735.20 in medical costs as a result of the accident. In addition, it is anticipated that he will need cervical surgery which will cost $49,735. This surgery is scheduled for next week.

3. Petitioner had a pre-existing, non-symptomatic, degenerative cervical condition at the time of the accident. The accident aggravated this condition, lighting it up, and causing it to become symptomatic. Petitioner's condition improved with conservative care over the months following the accident, but he never returned to pre-accident status. By July 18, 2001 he had improved considerably. At the end of July and into August of 2001, Petitioner suffered a significant relapse. It is unclear what the triggering mechanism for this relapse was. It may have been a long airplane ride, too much activity at a wedding reception, or coughing from pneumonia. Any of these events could have triggered the relapse, and each may be as traumatic as this very minor automobile collision. In any event, Petitioner has continued to experience more pain from this time and the evidence indicates that the cause of the problem now is a combination of the pre-existing degenerative disc disease, the automobile accident and whatever triggered the July 2001 set back.

4. Although the *Biswell* case would indicate that when a condition is aggravated by a traumatic incident, the subsequent trauma is the sole proximate cause of the injury, subsequent

case law has modified this to the extent that a trier of fact can allocate causation. See *Tingy v. Christensen* 987 P.2d 588 (1999).

5. The settlement from the liability carrier is a reasonable amount to settle the case prior to the determination to have surgery. Prior to the July 2001 point, the only proximate cause of the injury was presumed to be the motor vehicle accident. Petitioner had incurred about $15,000 in medical expenses. He had undergone considerable pain and suffering, especially in wearing a brace for several months in an attempt to stabilize his neck. The settlement did not compensate him for the set back that occurred in July of 2001 and persists to the present time.

6. The accident was 50% responsible for the needed future surgery. The pre-existing condition and the triggering mechanism of July 2001 are 50% responsible for the need for surgery.

7. Petitioner has not proven an income loss in the past or future as a result of the motor vehicle accident.

8. Petitioner is entitled to general damages as a result of the surgery. Included in the general damage figure is Mrs. Christiansen's loss as a result of having to work more in the business, as well as Petitioner's loss of enjoyment of life, pain and suffering associated with the surgery and recovery, future medical, future disability and future loss of household services. This general damage amount is $100,000.

9. Petitioner is not entitled to interest on the medical specials, in that they have not yet been incurred.

10. The arbitrator will retain jurisdiction to modify the Award if Petitioner determines not to have the scheduled surgery. Unless the parties request return of the medical records in the Arbitrator's possession, they will be destroyed within 30 days.

Award:

Cost of Surgery	**$49,735.00**
General Damages	**100,000**
Sub Total	**149,735.00**
X ½	
TOTAL AWARD	**$74,867.50**

DATED this 8th of December, 2003

Scott Daniels
Arbitrator

CERTIFICATE OF SERVICE

I, Scott Daniels, certify that I served the foregoing Award of Arbitrator upon the parties by mailing to:

Mr. Scott D. Brown
Nuttall & Brown
6925 Union Park Center #210
Midvale, UT 84047

Mr. Michael Hanson
215 S. State St. #500
Salt Lake City, UT 84111

First class, postage prepaid, on the 8th day of December 2003

Scott Daniels

THIS MULTI-TONE AREA OF THE DOCUMENT CHANGES COLOR GRADUALLY AND EVENLY FROM DARK TO LIGHT.

FARMERS

62-20/311

Farmers Insurance Exchange
Pocatello Service Center
2500 S. 5th Ave
Pocatello, ID 83201

Claim #: 1001058188-1
SALN: 12151027

Check No. 1111197900

Date: 12/15/2003

PAY Seventy Four Thousand Eight Hundred Sixty Seven Dollars And Fifty Cents $74,867.50***

NOT GOOD AFTER SIX MONTHS

To the order of
Byron Christiansen & The Law Firm Of
Nuttal, Brown, Pc
6925 Union Park Center, Suite 210
Midvale, Ut, 84047

Citibank Delaware, A Subsidiary of Citicorp One Penn's Way, New Castle, DE 19720

THE ORIGINAL DOCUMENT HAS A REFLECTIVE WATERMARK ON THE BACK. HOLD AT AN ANGLE TO VIEW WHEN CHECKING THE ENDORSEMENT.

⑈1111197900⑈ ⑆031100209⑆ 38738764⑈

J. Michael Hansen, Esq. USB No. 1339
of and for
NELSON, CHIPMAN, QUIGLEY & HANSEN
Attorneys for Respondent
215 South State Street, Suite 500
Salt Lake City, Utah 84111
Telephone: (801) 364-3627

ARBITRATION

BYRON C. CHRISTIANSEN,	:	**SATISFACTION OF ARBITRATION AWARD**
	:	
Claimant,	:	
vs.	:	
	:	
FARMERS INSURANCE EXCHANGE,	:	
	:	Case No. 03-A084
Respondent.	:	**Arbitrator: Scott Daniels**

An Award of Arbitrator was entered in this matter on December 8, 2003, in the sum of $74,867.50. Full and complete satisfaction of the Award of Arbitrator has been received.

DATED this 15th day of December 2003.

NUTTALL, BROWN & ASSOCIATES

SCOTT D. BROWN
Attorney for Claimant

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

SUBSCRIBED AND SWORN TO before me this 15 day of December, 2003.

Notary Public
REBECCA T. DUNCAN
6925 Union Park Center, Suite 210
Midvale, Utah 84047
My Commission Expires
May 16, 2004
State of Utah

Rebecca T. Duncan
NOTARY PUBLIC
Residing at Midvale

My Commission Expires:
May 16, 2004

EXHIBIT TWO

IN THE SUPREME COURT OF THE STATE OF UTAH

---oo0oo---

Byron Child Christiansen and
Merrilee Christiansen, husband
and wife,
Plaintiffs and Respondents,

v.

No. 20030836-SC
030908140

Farmers Insurance Exchange,
Defendant and Petitioner.

ORDER

This matter is before the Court upon a Petition for Permission to Appeal an Interlocutory Order, filed pursuant to Rule 5 of the Utah Rules of Appellate Procedure.

IT IS HEREBY ORDERED that the Petition for Permission to Appeal an Interlocutory Order filed on October 17, 2003 is granted.

For The Court:

December 10, 2003
Date

Christine M. Durham
Chief Justice

EXHIBIT THREE

In The Third Judicial District Court Of Salt Lake County
State of Utah

BYRON CHILD CHRISTIANSEN MERRILEE CHRISTIANSEN, Plaintiff, vs. FARMERS INSURANCE EXCHANGE Defendant.	**NOTICE OF DECISION** Judge: Joseph C Fratto, Jr Case No. 030908140

RE: Plaintiff's Rule 37 Motion for Order Compelling Discovery; Defendant's Motion to Compel Arbitration and Request to Stay breach of Contract, Bad Faith and Associated Causes; Defendant's Motion for Protective Order pursuant to Rule 26(c).

See attached decision.

Dated this 7 day of October, 2003.

Deputy Court Clerk

BYRON CHILD CHRISTIANSEN
MERRILEE CHRISTIANSEN

V.

FARMERS INSURANCE EXCHANGE

MINUTE ENTRY
Case No. 030908140
Judge Fratto

The matter is before the court to consider Plaintiffs' Rule 37 Motion for Order Compelling Discovery; Defendant's Motion to Compel Arbitration and Request to Stay Breach of Contract, Bad Faith and Associated Causes; defendant's Motion for Protective Order Pursuant to Rule 26(c).

Plaintiffs' filed a complaint alleging three causes of action: breach of contract, breach of implied covenant of good faith and fair dealing, breach of fiduciary duty. By stipulation, the claim for breach of fiduciary duty was dismissed on July 15, 2003.

There is a written policy agreement providing for arbitration. The scope of arbitration is contractually limited to disputes relative to recovery for damages caused by an uninsured or under-insured motorist.

The applicable statutory provision is 78-31a-108(7), which provides that:

(7) If the court orders arbitration, the court on just terms shall stay any judicial proceeding that involves a claim subject to the arbitration. If a claim subject to the arbitration is severable, the court may limit the stay to that claim.

Plaintiffs' complaint incorporates in each cause of action similar allegations of fact and

theories of recovery. However, a distinction can be made between the causes. First Cause, Breach of Contract seeks damages resulting from the negligence of the uninsured motorist to which plaintiffs' claim they are contractually entitled from defendant. The breach is the failure of defendant to pay these damages.

Second Cause, Breach of Implied Covenant of Good Faith and Fair Dealing prays relief for defendant's failure to act upon, investigate and process plaintiffs' claims in a timely manner. The first claim incorporates a dispute anticipated by the parties arbitration covenant. The second, though related in the pleadings, is a different claim of breach of contract, not subject to arbitration.

Although the court is afforded discretion in the statute, severance of the claims in this case is appropriate. Plaintiffs' second cause cannot be arbitrated, and the results from the arbitration will not affect the judicial outcome of the second cause.

Accordingly, arbitration of plaintiffs' First Cause of Action, Breach of Contract is ordered, and that claim is stayed during the pendency of the arbitration. Defendant's request to stay the claim of breach of the implied covenant of good faith and fair dealing is denied. That cause of action will proceed.

Plaintiffs' seek an order compelling defendant to admit or deny a portion of those certain Request for Admissions and Request for Production of Documents. The court has a copy of the Request for Admissions, but does not have a request for production, and, consequently, can make no determination concerning them.

Defendant responded to the request for admissions, as permitted by Rule 36(a)(1) *Utah Rules of Civil Procedure*, by lodging objections to certain requests on various grounds. Rather

than compelling a response, the court is called upon to rule on the objections, and will do so.

The objections to Request Nos. 1, 2, 4, 5, 6, 8 and 9 are overruled. Counsel for plaintiff's shall provide to counsel for defendant a copy of the written statement referenced in Request No. 7, and defendant shall admit or deny within five (5) day of receipt of the same.

Defendant's objection, lack of foundation, to Request No. 10 is sustained.

Defendant shall have ten (10) days from receipt of this minute entry to admit or deny the requests to which an objection was overruled.

Defendant's motion seeking a protective order concerning plaintiff's request for production of documents cannot be addressed herein. As indicated above, the court does not have a copy of the request, and cannot determine whether defendant is entitled to the court's order protecting it from producing the material.

Accordingly, the clerk will schedule a telephonic conference to discuss the motion, and defendant will provide a copy of the request directly to the clerk not less that two (2) days before the conference.

This minute entry constitutes the order regarding the matters addressed herein. No further order is required.

Dated this 3rd day of October, 2003

BY THE COURT:

JUDGE

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 030908140 by the method and on the date specified.

METHOD	NAME
Mail	SCOTT D. BROWN ATTORNEY PLA 6925 UNION PARK CENTER SUITE 210 MIDVALE, UT 84047
Mail	BARBARA L MAW ATTORNEY DEF 185 SOUTH STATE STREET SUITE 340 SALT LAKE CITY UT 84111

Dated this 7 day of October, 2003.

Deputy Court Clerk

Tab 2

History: C. 1953, 31A-22-304, enacted by L. 1985, ch. 242, § 27; 1992, ch. 132, § 2; 1993, ch. 271, § 1.

NOTES TO DECISIONS

ANALYSIS

Liability of county.
Liability of self-insurers.
Step-down coverage.
Cited.

Liability of county.

Liability of county, as self-insurer of own vehicles operated by permissive users, under former law. See Foster v. Salt Lake County, 712 P.2d 224 (Utah 1985).

Liability of self-insurers.

Public policy as expressed in Utah law is that self-insurers must provide security for damages inflicted by themselves, and by permissive users of their vehicles. There is no expressed public policy that would require finding liability based upon mere ownership of a vehicle. Lane v. Honeywell, Inc., 663 F. Supp. 370 (D. Utah 1987) (decided under former Title 31).

Step-down coverage.

Section 31A-22-303 does not prohibit insurers from providing step-down coverage for permissive users, as long as the coverage satisfies the statutory minimums set forth in this section. Cullum v. Farmer's Ins. Exch., 857 P.2d 922 (Utah 1993).

Cited in Wagner v. Farmers Ins. Exch., 786 P.2d 763 (Utah Ct. App. 1990).

COLLATERAL REFERENCES

A.L.R. — Consortium claim of spouse, parent or child of accident victim as within extended "per accident" rather than "per person" coverage of automobile liability policy, 46 A.L.R.4th 735.

What constitutes single accident or occurrence within liability policy limiting insurer's liability to a specified amount per accident or occurrence, 64 A.L.R.4th 668.

Validity and operation of "step-down" provision of automobile liability policy reducing coverage for permissive users, 29 A.L.R.5th 469.

31A-22-305. Uninsured and underinsured motorist coverage.

(1) As used in this section, "covered persons" includes:
(a) the named insured;
(b) persons related to the named insured by blood, marriage, adoption, or guardianship, who are residents of the named insured's household, including those who usually make their home in the same household but temporarily live elsewhere;
(c) any person occupying or using a motor vehicle:
(i) referred to in the policy; or
(ii) owned by a self-insurer; and
(d) any person who is entitled to recover damages against the owner or operator of the uninsured or underinsured motor vehicle because of bodily injury to or death of persons under Subsection (1)(a), (b), or (c).

(2) As used in this section, "uninsured motor vehicle" includes:
(a) (i) a motor vehicle, the operation, maintenance, or use of which is not covered under a liability policy at the time of an injury-causing occurrence; or
(ii) (A) a motor vehicle covered with lower liability limits than required by Section 31A-22-304; and
(B) the motor vehicle described in Subsection (2)(a)(ii)(A) is uninsured to the extent of the deficiency;

(b) an unidentified motor vehicle that left the scene of an accident proximately caused by the motor vehicle operator;

(c) a motor vehicle covered by a liability policy, but coverage for an accident is disputed by the liability insurer for more than 60 days or continues to be disputed for more than 60 days; or

(d) (i) an insured motor vehicle if, before or after the accident, the liability insurer of the motor vehicle is declared insolvent by a court of competent jurisdiction; and

(ii) the motor vehicle described in Subsection (2)(d)(i) is uninsured only to the extent that the claim against the insolvent insurer is not paid by a guaranty association or fund.

(3) (a) Uninsured motorist coverage under Subsection 31A-22-302(1)(b) provides coverage for covered persons who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness, disease, or death.

(b) For new policies written on or after January 1, 2001, the limits of uninsured motorist coverage shall be equal to the lesser of the limits of the insured's motor vehicle liability coverage or the maximum uninsured motorist coverage limits available by the insurer under the insured's motor vehicle policy, unless the insured purchases coverage in a lesser amount by signing an acknowledgment form provided by the insurer that:

(i) waives the higher coverage;

(ii) reasonably explains the purpose of uninsured motorist coverage; and

(iii) discloses the additional premiums required to purchase uninsured motorist coverage with limits equal to the lesser of the limits of the insured's motor vehicle liability coverage or the maximum uninsured motorist coverage limits available by the insurer under the insured's motor vehicle policy.

(c) Self-insurers, including governmental entities, may elect to provide uninsured motorist coverage in an amount that is less than their maximum self-insured retention under Subsections (3)(b) and (4)(a) by issuing a declaratory memorandum or policy statement from the chief financial officer or chief risk officer that declares the:

(i) self-insured entity's coverage level; and

(ii) process for filing an uninsured motorist claim.

(d) Uninsured motorist coverage may not be sold with limits that are less than the minimum bodily injury limits for motor vehicle liability policies under Section 31A-22-304.

(e) The acknowledgment under Subsection (3)(b) continues for that issuer of the uninsured motorist coverage until the insured, in writing, requests different uninsured motorist coverage from the insurer.

(f) (i) In conjunction with the first two renewal notices sent after January 1, 2001, for policies existing on that date, the insurer shall disclose in the same medium as the premium renewal notice, an explanation of the purpose of uninsured motorist coverage and the costs associated with increasing the coverage in amounts up to and including the maximum amount available by the insurer under the insured's motor vehicle policy.

(ii) The disclosure shall be sent to all insureds that carry uninsured motorist coverage limits in an amount less than the insured's motor

vehicle liability policy limits or the maximum uninsured motorist coverage limits available by the insurer under the insured's motor vehicle policy.

(a) (i) Except as provided in Subsection (4)(b), the named insured may reject uninsured motorist coverage by an express writing to the insurer that provides liability coverage under Subsection 31A-22-302(1)(a).

(ii) This rejection shall be on a form provided by the insurer that includes a reasonable explanation of the purpose of uninsured motorist coverage.

(iii) This rejection continues for that issuer of the liability coverage until the insured in writing requests uninsured motorist coverage from that liability insurer.

(b) (i) All persons, including governmental entities, that are engaged in the business of, or that accept payment for, transporting natural persons by motor vehicle, and all school districts that provide transportation services for their students, shall provide coverage for all motor vehicles used for that purpose, by purchase of a policy of insurance or by self-insurance, uninsured motorist coverage of at least $25,000 per person and $500,000 per accident.

(ii) This coverage is secondary to any other insurance covering an injured covered person.

(c) Uninsured motorist coverage:

(i) is secondary to the benefits provided by Title 34A, Chapter 2, Workers' Compensation Act;

(ii) may not be subrogated by the Workers' Compensation insurance carrier;

(iii) may not be reduced by any benefits provided by Workers' Compensation insurance;

(iv) may be reduced by health insurance subrogation only after the covered person has been made whole;

(v) may not be collected for bodily injury or death sustained by a person:

(A) while committing a violation of Section 41-1a-1314;

(B) who, as a passenger in a vehicle, has knowledge that the vehicle is being operated in violation of Section 41-1a-1314; or

(C) while committing a felony; and

(vi) notwithstanding Subsection (4)(c)(v), may be recovered:

(A) for a person under 18 years of age who is injured within the scope of Subsection (4)(c)(v) but limited to medical and funeral expenses; or

(B) by a law enforcement officer as defined in Section 53-13-103, who is injured within the course and scope of the law enforcement officer's duties.

(d) As used in this Subsection (4):

(i) "Governmental entity" has the same meaning as under Section 63-30-2.

(ii) "Motor vehicle" has the same meaning as under Section 41-1a-102.

When a covered person alleges that an uninsured motor vehicle under ection (2)(b) proximately caused an accident without touching the covered

person or the motor vehicle occupied by the covered person, the covered person must show the existence of the uninsured motor vehicle by clear and convincing evidence consisting of more than the covered person's testimony.

(6) (a) The limit of liability for uninsured motorist coverage for two or more motor vehicles may not be added together, combined, or stacked to determine the limit of insurance coverage available to an injured person for any one accident.

(b) (i) Subsection (6)(a) applies to all persons except a covered person as defined under Subsection (7)(b)(ii).

(ii) A covered person as defined under Subsection (7)(b)(ii) is entitled to the highest limits of uninsured motorist coverage afforded for any one motor vehicle that the covered person is the named insured or an insured family member.

(iii) This coverage shall be in addition to the coverage on the motor vehicle the covered person is occupying.

(iv) Neither the primary nor the secondary coverage may be set off against the other.

(c) Coverage on a motor vehicle occupied at the time of an accident shall be primary coverage, and the coverage elected by a person described under Subsections (1)(a) and (b) shall be secondary coverage.

(7) (a) Uninsured motorist coverage under this section applies to bodily injury, sickness, disease, or death of covered persons while occupying or using a motor vehicle only if the motor vehicle is described in the policy under which a claim is made, or if the motor vehicle is a newly acquired or replacement motor vehicle covered under the terms of the policy. Except as provided in Subsection (6) or this Subsection (7), a covered person injured in a motor vehicle described in a policy that includes uninsured motorist benefits may not elect to collect uninsured motorist coverage benefits from any other motor vehicle insurance policy under which he is a covered person.

(b) Each of the following persons may also recover uninsured motorist benefits under any one other policy in which they are described as a "covered person" as defined in Subsection (1):

(i) a covered person injured as a pedestrian by an uninsured motor vehicle; and

(ii) except as provided in Subsection (7)(c), a covered person injured while occupying or using a motor vehicle that is not owned, leased, or furnished, to the covered person, to the covered person's spouse, or to the covered person's resident parent or resident sibling.

(c) (i) A covered person may recover benefits from no more than two additional policies, one additional policy from each parent's household if the covered person is:

(A) a dependent minor of parents who reside in separate households; and

(B) injured while occupying or using a motor vehicle that is not owned, leased, or furnished to the covered person, the covered person's resident parent, or to the covered person's resident sibling.

(ii) Each parent's policy under this Subsection (7)(c) is liable only for the percentage of the damages that the limit of liability of each parent's policy of uninsured motorist coverage bears to the total of all uninsured coverage applicable to the accident.

(d) A covered person's recovery under any available policies may not exceed the full amount of damages.

(e) A covered person in Subsection (7)(b) is not barred against making subsequent elections if recovery is unavailable under previous elections.

(8) (a) As used in this section, "underinsured motor vehicle" includes a motor vehicle, the operation, maintenance, or use of which is covered under a liability policy at the time of an injury-causing occurrence, but which has insufficient liability coverage to compensate fully the injured party for all special and general damages.

(b) The term "underinsured motor vehicle" does not include:

(i) a motor vehicle that is covered under the liability coverage of the same policy that also contains the underinsured motorist coverage;

(ii) an uninsured motor vehicle as defined in Subsection (2); or

(iii) a motor vehicle owned or leased by the named insured, the named insured's spouse, or any dependant of the named insured.

(9) (a) (i) Underinsured motorist coverage under Subsection 31A-22-302(1)(c) provides coverage for covered persons who are legally entitled to recover damages from owners or operators of underinsured motor vehicles because of bodily injury, sickness, disease, or death.

(ii) A covered person occupying or using a motor vehicle owned, leased, or furnished to the covered person, the covered person's spouse, or covered person's resident relative may recover underinsured benefits only if the motor vehicle is:

(A) described in the policy under which a claim is made; or

(B) a newly acquired or replacement motor vehicle covered under the terms of the policy.

(b) For new policies written on or after January 1, 2001, the limits of underinsured motorist coverage shall be equal to the lesser of the limits of the insured's motor vehicle liability coverage or the maximum underinsured motorist coverage limits available by the insurer under the insured's motor vehicle policy, unless the insured purchases coverage in a lesser amount by signing an acknowledgment form provided by the insurer that:

(i) waives the higher coverage;

(ii) reasonably explains the purpose of underinsured motorist coverage; and

(iii) discloses the additional premiums required to purchase underinsured motorist coverage with limits equal to the lesser of the limits of the insured's motor vehicle liability coverage or the maximum underinsured motorist coverage limits available by the insurer under the insured's motor vehicle policy.

(c) Self-insurers, including governmental entities, may elect to provide underinsured motorist coverage in an amount that is less than their maximum self-insured retention under Subsections (9)(b) and (9)(g) by issuing a declaratory memorandum or policy statement from the chief financial officer or chief risk officer that declares the:

(i) self-insured entity's coverage level; and

(ii) process for filing an underinsured motorist claim.

(d) Underinsured motorist coverage may not be sold with limits that are less than $10,000 for one person in any one accident and at least $20,000 for two or more persons in any one accident.

(e) The acknowledgment under Subsection (9)(b) continues for that issuer of the underinsured motorist coverage until the insured, in writing, requests different underinsured motorist coverage from the insurer.

(f) The named insured's underinsured motorist coverage, as described in Subsection (9)(a), is secondary to the liability coverage of an owner or operator of an underinsured motor vehicle, as described in Subsection (8). Underinsured motorist coverage may not be set off against the liability coverage of the owner or operator of an underinsured motor vehicle, but shall be added to, combined with, or stacked upon the liability coverage of the owner or operator of the underinsured motor vehicle to determine the limit of coverage available to the injured person.

(g) (i) A named insured may reject underinsured motorist coverage by an express writing to the insurer that provides liability coverage under Subsection 31A-22-302(1)(a).

(ii) This written rejection shall be on a form provided by the insurer that includes a reasonable explanation of the purpose of underinsured motorist coverage and when it would be applicable.

(iii) This rejection continues for that issuer of the liability coverage until the insured in writing requests underinsured motorist coverage from that liability insurer.

(h) (i) In conjunction with the first two renewal notices sent after January 1, 2001, for policies existing on that date, the insurer shall disclose in the same medium as the premium renewal notice, an explanation of the purpose of underinsured motorist coverage and the costs associated with increasing the coverage in amounts up to and including the maximum amount available by the insurer under the insured's motor vehicle policy.

(ii) The disclosure shall be sent to all insureds that carry underinsured motorist coverage limits in an amount less than the insured's motor vehicle liability policy limits or the maximum underinsured motorist coverage limits available by the insurer under the insured's motor vehicle policy.

(10) (a) (i) Except as provided in this Subsection (10), a covered person injured in a motor vehicle described in a policy that includes underinsured motorist benefits may not elect to collect underinsured motorist coverage benefits from any other motor vehicle insurance policy.

(ii) The limit of liability for underinsured motorist coverage for two or more motor vehicles may not be added together, combined, or stacked to determine the limit of insurance coverage available to an injured person for any one accident.

(iii) Subsection (10)(a)(ii) applies to all persons except a covered person as defined under Subsections (10)(b)(i) and (ii).

(b) (i) Except as provided in Subsection (10)(b)(ii), a covered person injured while occupying, using, or maintaining a motor vehicle that is not owned, leased, or furnished to the covered person, the covered person's spouse, or the covered person's resident parent or resident sibling, may also recover benefits under any one other policy under which they are a covered person.

(ii) (A) A covered person may recover benefits from no more than two additional policies, one additional policy from each parent's household if the covered person is:

(I) a dependent minor of parents who reside in separate households; and

(II) injured while occupying or using a motor vehicle that is not owned, leased, or furnished to the covered person, the covered person's resident parent, or the covered person's resident sibling.

(B) Each parent's policy under this Subsection (10)(b)(ii) is liable only for the percentage of the damages that the limit of liability of each parent's policy of underinsured motorist coverage bears to the total of all underinsured coverage applicable to the accident.

(iii) A covered person's recovery under any available policies may not exceed the full amount of damages.

(iv) Underinsured coverage on a motor vehicle occupied at the time of an accident shall be primary coverage, and the coverage elected by a person described under Subsections (1)(a) and (b) shall be secondary coverage.

(v) The primary and the secondary coverage may not be set off against the other.

(vi) A covered person as defined under Subsection (10)(b)(i) is entitled to the highest limits of underinsured motorist coverage under only one additional policy per household applicable to that covered person as a named insured, spouse, or relative.

(vii) A covered injured person is not barred against making subsequent elections if recovery is unavailable under previous elections.

(c) Underinsured motorist coverage:

(i) is secondary to the benefits provided by Title 34A, Chapter 2, Workers' Compensation Act;

(ii) may not be subrogated by the Workers' Compensation insurance carrier;

(iii) may not be reduced by any benefits provided by Workers' Compensation insurance;

(iv) may be reduced by health insurance subrogation only after the covered person has been made whole;

(v) may not be collected for bodily injury or death sustained by a person:

(A) while committing a violation of Section 41-1a-1314;

(B) who, as a passenger in a vehicle, has knowledge that the vehicle is being operated in violation of Section 41-1a-1314; or

(C) while committing a felony; and

(vi) notwithstanding Subsection (10)(c)(v), may be recovered:

(A) for a person under 18 years of age who is injured within the scope of Subsection (10)(c)(v) but limited to medical and funeral expenses; or

(B) by a law enforcement officer as defined in Section 53-13-103, who is injured within the course and scope of the law enforcement officer's duties.

(11) The inception of the loss under Subsection 31A-21-313(1) for underinsured motorist claims occurs upon the date of the last liability policy payment.

(12) (a) Within five business days after notification in a manner specified by the department that all liability insurers have tendered their liability policy limits, the underinsured carrier shall either:

(i) waive any subrogation claim the underinsured carrier may have against the person liable for the injuries caused in the accident; or

(ii) pay the insured an amount equal to the policy limits tendered by the liability carrier.

(b) If neither option is exercised under Subsection (12)(a), the subrogation claim is deemed to be waived by the underinsured carrier.

(13) Except as otherwise provided in this section, a covered person may seek, subject to the terms and conditions of the policy, additional coverage under any policy:

(a) that provides coverage for damages resulting from motor vehicle accidents; and

(b) that is not required to conform to Section 31A-22-302.

History: C. 1953, 31A-22-305, enacted by L. 1985, ch. 242, § 27; 1986, ch. 204, § 157; 1987, ch. 162, § 1; 1992, ch. 1, § 4; 1992, ch. 132, § 3; 1993, ch. 271, § 2; 1994, ch. 316, § 15; 1995, ch. 294, § 1; 1996, ch. 240, § 12; 1997, ch. 375, § 14; 1999, ch. 158, § 1; 2000, ch. 188, § 1; 2001, ch. 59, § 1; 2003, ch. 76, § 2; 2003, ch. 218, § 2.

Amendment Notes. — The 1999 amendment, effective March 18, 1999, added Subsection (2)(c), redesignating former Subsection (2)(c) as (2)(d), and made related and stylistic changes in the section.

The 2000 amendment, effective May 1, 2000, added Subsections (3)(b) to (3)(e), (4)(a)(ii), (4)(c)(ii) to (4)(c)(iv), (9)(b) to (9)(d), (9)(f)(ii), (10)(c), and (11), and made related changes; deleted "For new policies or contracts written after January 1, 1993" from the beginning of Subsection (9)(f)(i); rewrote Subsection (9)(g), revising the provisions for notice and disclosure; and made stylistic changes.

The 2001 amendment, effective April 30, 2001, corrected a subsection reference in Subsection (10)(b)(ii) and added Subsection (12).

The 2003 amendment by ch. 76, effective May 5, 2003, substituted "motor vehicle" for "vehicle" several times throughout the section; deleted "beginning with the effective date of this act" before "continues" in Subsection (2)(c); added Subsections (4)(c)(v), (7)(c) and (d), (8)(b)(iii), (9)(a)(ii), and (13); rewrote Subsections (7)(b), (10), and (11); and made related and stylistic changes.

The 2003 amendment by ch. 218, effective May 5, 2003, inserted subdivision designations (i) and (ii) in Subsection (1)(c); deleted "beginning with the effective date of this act" before "continues" in Subsection (2)(c); added "and" at the end of Subsection (2)(d)(i); added Subsections (3)(c) and (9)(c); made appropriate changes in subsection designations; and made a spelling correction and stylistic changes.

This section has been reconciled by the Office of Legislative Research and General Counsel.

NOTES TO DECISIONS

ANALYSIS

Construction with other statutes.

The Workers' Compensation Act is not the exclusive remedy for injured employees who seek to recover from someone who is not their employer, or an officer, agent, or employee of the employer, and these employees do have viable claims against such third parties. Lieber v. ITT Hartford Ins. Ctr., Inc., 2000 UT 90, 15 P.3d 1030.

The Workers' Compensation Act does not preclude injured employees from having alternative viable claims against an uninsured third-party tortfeasor, or against an uninsured motorist insurance carrier; therefore, the trial court erred when it interpreted Subsection (4)(b)(ii) of this section to preclude recovery of both workers' compensation and uninsured motorist benefits in every case. Lieber v. ITT Hartford Ins. Ctr., Inc., 2000 UT 90, 15 P.3d 1030.

Exclusionary clause.

An exclusionary clause to uninsured motorist coverage is permissible. Former § 41-12-21.1, which required insurers to offer uninsured motorist coverage and authorized motorists to waive coverage, did not further require insurers to allow an individual to purchase insurance on one vehicle and obtain coverage on all the other vehicles in his household. Clark v. State Farm Mut. Auto. Ins. Co., 743 P.2d 1227 (Utah 1987).

Neither this section nor public policy forbids restrictions on uninsured motorist coverage

such as an exclusion from coverage of vehicles owned by the insured not included in the policy and for which no premiums are paid. Hind v. Quilles, 745 P.2d 1239 (Utah 1987).

A policy that covered the insured for any injury caused by an uninsured motorist, excluding therefrom only uninsured "automobiles" owned by the insured, did not exclude uninsured motorist coverage when the insured was operating a motorcycle. Bear River Mut. Ins. Co. v. Wright, 770 P.2d 1019 (Utah Ct. App. 1989).

Hit and run.

Utah law does not require an actual collision to recover under the uninsured motorist statute. Marakis v. State Farm Fire & Cas. Co., 765 P.2d 882 (Utah 1988) (decided under prior law).

"Legally entitled to recover."

For an insured to satisfy the "legally entitled to recover" criterion, a viable claim that can be reduced to judgment is required. Peterson v. Utah Farm Bureau Ins. Co., 927 P.2d 192 (Utah Ct. App. 1996), cert. denied, 934 P.2d 652 (Utah 1997).

Cited in Wagner v. Farmers Ins. Exch., 786 P.2d 763 (Utah Ct. App. 1990); United States Fid. & Guar. Co. v. Sandt, 854 P.2d 519 (Utah 1993); Travelers/Aetna Ins. Co. v. Wilson, 2002 UT App 221, 51 P.3d 1288, cert. denied, 59 P.3d 603.

COLLATERAL REFERENCES

Am. Jur. 2d. — 7 Am. Jur. 2d Automobile Insurance § 35 et seq.

A.L.R. — Time limitations as to claims based on uninsured motorist clause, 28 A.L.R.3d 580.

Validity of exclusion in automobile insurance policy precluding recovery of no-fault benefits for injuries arising out of the ownership, maintenance, or use of an uninsured vehicle owned by an insured, 18 A.L.R.4th 632.

Validity, construction, and effect of "consent to sue" clauses in uninsured motorist endorsement of automobile insurance policy, 24 A.L.R.4th 1024.

Combining or "stacking" uninsured motorist coverages provided in policies issued by different insurers to different insureds, 28 A.L.R.4th 362.

Validity of exclusion of injuries sustained by insured while occupying "owned" vehicle not insured by policy, 30 A.L.R.4th 172.

Validity, construction, and effect of statute establishing compensation for claims not paid because of insurer's insolvency, 30 A.L.R.4th 1110.

Uninsured motorist insurance: injuries to motorcyclist as within affirmative or exclusionary terms of automobile insurance policy, 46 A.L.R.4th 771.

Punitive damages as within coverage of uninsured or underinsured motorist insurance, 54 A.L.R.4th 1186.

Right of insured, precluded from recovering against owner or operator of uninsured motor vehicle because of governmental immunity, to recover uninsured motorist benefits, 55 A.L.R.4th 806.

What constitutes "entering" or "alighting from" vehicle within meaning of insurance policy, or statute mandating insurance coverage, 59 A.L.R.4th 149.

Automobile uninsured motorist coverage: "legally entitled to recover" clause as barring claim compensable under workers' compensation statute, 82 A.L.R.4th 1096.

"Excess" or "umbrella" insurance policy as providing coverage for accidents with uninsured or underinsured motorists, 2 A.L.R.5th 922.

Insured's recovery of uninsured motorist's claim against insurer as affecting subsequent recovery against tortfeasors causing injury, 3 A.L.R.5th 746.

Uninsured and underinsured motorist coverage: enforceability of policy provision limiting appeals from arbitration, 23 A.L.R.5th 801.

Uninsured or underinsured motorist insurance: validity and construction of policy provision purporting to reduce recovery by amount of social security disability benefits or payments under similar disability benefits law, 24 A.L.R.5th 766.

Uninsured and underinsured motorist coverage: validity, construction, and effect of policy provision purporting to reduce coverage by amount paid or payable under workers' compensation law, 31 A.L.R.5th 116.

Right of employer or workers' compensation carrier to lien against, or reimbursement out of, uninsured or underinsured motorist proceeds payable to employee injured by third party, 33 A.L.R.5th 587.

Validity and construction of provision of uninsured or underinsured motorist coverage that damages under the coverage will be reduced by amount of recovery from tortfeasor, 40 A.L.R.5th 603.

Requirement that multicoverage umbrella insurance policy offer uninsured or underinsured motorist coverage equal to liability limits under umbrella provisions, 52 A.L.R.5th 451.

Validity of territorial restrictions on uninsured/underinsured coverage in automobile insurance policies, 55 A.L.R.5th 747.

Validity, construction, and application of exclusion of government vehicles from uninsured motorist provision, 58 A.L.R.5th 511.

Automobile insurance: what constitutes "occupying" under owned-vehicle exclusion on uninsured- or underinsured-motorist coverage of automobile insurance policy, 59 A.L.R.5th 191.

Who is "member" or "resident" of same "family" or "household" within no-fault or uninsured motorist provisions of motor vehicle insurance policy, 66 A.L.R.5th 269.

Uninsured motorist indorsement: construction and application of requirement that there be "physical contact" with unidentified or hit-and-run vehicle; "miss-and-run" cases, 77 A.L.R.5th 319.

Uninsured motorist indorsement: general issues regarding requirement that there be "physical contact" with unidentified or hit-and-run vehicle, 78 A.L.R.5th 341.

Uninsured motorist indorsement: construction and application of requirement that there be "physical contact" with unidentified or hit-and-run vehicle; "hit-and-run" cases, 79 A.L.R.5th 289.

31A-22-305.5. Property damage protection.

(1) At the request of the named insured, every motor vehicle liability policy of insurance under Sections 31A-22-303 and 31A-22-304 or combination of policies purchased to satisfy the owner's or operator's security requirement of Section 41-12a-301 which policy does not provide insurance for collision damage shall provide coverage for property damage to the motor vehicle described in the policy for the benefit of covered persons, as defined under Section 31A-22-305, who are legally entitled to recover damages from the owner or operator of an uninsured motor vehicle, as defined under Subsections 31A-22-305(2)(a), (c), and (d), arising out of the operation, maintenance, or use of an uninsured motor vehicle.

(2) The coverage provided under this section shall include payment for loss or damage to the motor vehicle described in the policy, not to exceed the motor vehicle's actual cash value or $3,500, whichever is less. Property damage does not include compensation for loss of use of the motor vehicle.

(3) The coverage provided under this section shall be payable only if:

(a) the occurrence causing the property damage involves actual physical contact between the covered motor vehicle and an uninsured motor vehicle;

(b) the owner, operator, or license plate number of the uninsured motor vehicle is identified; and

(c) the insured or someone on his behalf reports the occurrence within ten days to the insurer or his agent.

(4) The coverage provided under this section shall be subject to a $250 deductible and shall be excess to any other insurance covering property damage to the motor vehicle described in the policy.

(5) The insurer providing coverage under this section may make available additional deductibles at appropriate premium rates.

(6) No rating surcharge may be applied to any policy of motor vehicle insurance issued in this state as a result of payment of a claim made under this section.

History: C. 1953, 31A-22-305.5, enacted by L. 1990, ch. 321, § 1; 1999, ch. 158, § 2.

Amendment Notes. — The 1999 amendment, effective March 18, 1999, substituted "Subsections 31A-22-305(2)(a), (c), and (d)" for "Subsections 31A-22-305(2)(a) and (c)" in Subsection (1).